Supreme Court, U.S.
FILED
SEP 25 1980
MICHAEL RODAK, JR., CLERK

No. 80-478

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AIRLINE DIVISION; TEAMSTERS LOCAL 2707; MARVIN L. GRISWOLD; TEAMSTERS LOCAL 732,

Petitioners,

v.

TRANS INTERNATIONAL AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a carrier's action for injunctive and equitable relief against a strike remain live and capable of adjudication despite the settlement, by execution of a new collective-bargaining agreement, of all issues out of which the strike and the main action arose, simply because the carrier claims an entitlement to compensatory fines for contempt of a preliminary injunction?

2. Did the district court lack jurisdiction under the Railway Labor and Norris-LaGuardia Acts to enjoin flight engineers employed by the carrier from respecting the picket lines established by its flight attendants, where the engineers' sympathetic action did not arise from an arbitrable dispute between them and the carrier, but was engaged in solely to support the flight attendants' bargaining position in a major dispute over changes in rates of pay, rules and working conditions?

PARTIES IN THE COURT OF APPEALS

The parties before the Ninth Circuit Court of Appeals were the International Brotherhood of Teamsters, Airline Division; Airline and Aerospace Employees, Teamsters Local 732; Airline, Aerospace and Allied Employees, Teamsters Local 2707; Marvin L. Griswold, Secretary-Treasurer, Teamsters Local 2707 (petitioners in this Court); Air Line Pilots Association, International, AFL-CIO (separately petitioning in this Court); and Trans International Airlines, Inc. (respondent in this Court).

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v.

TRANS INTERNATIONAL AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The International Brotherhood of Teamsters, Airline Division, its affiliated Locals 732 and 2707, and Marvin L. Griswold (collectively "Teamsters"), petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on February 14, 1980.

OPINIONS BELOW

Neither the opinion of the United States District Court for the Northern District of California (A. 9a) [1] nor the opinion of the Ninth Circuit Court of Appeals (A. 31a) is officially reported.

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[1] References to pages in the appendix to this petition are designated "A."

JURISDICTION

The decision and judgment of the Court of Appeals was entered on February 14, 1980 (A. 31a). The International Brotherhood of Teamsters, among others, filed a timely petition for rehearing which was denied on June 27, 1980 (A. 80a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Railway Labor Act (RLA), §§ 2, First, Fourth, 5, 6 & 204, 45 U.S.C. §§ 152, First, Fourth, 155, 156, 184, and the Norris-LaGuardia Act, § 4, 29 U.S.C. § 104, are reproduced in the Appendix (A. 82a).

STATEMENT OF THE CASE

Trans International Airlines, Inc. (TIA), the respondent, is the corporate survivor of a merger between TIA and Saturn Airways, Inc., which was effectuated on November 30, 1976. When this action was initiated on September 7, 1977, TIA's flight attendants and flight engineers were represented by the Teamsters, and the pilots on the post-merger carrier were represented by the Airline Pilots Association (ALPA). Separate collective-bargaining agreements were in effect covering the former Saturn engineers and pilots. TIA's engineers and pilots were covered by a pre-merger Crewmember Agreement,[2] while the TIA and Saturn flight attendants were covered, until September 8, 1977, by the pre-merger TIA Flight Attendant Agreement.

The major contract dispute out of which this litigation arose began with service of the Teamsters' § 6 Notice, dated January 9, 1976, advising TIA that the flight at-

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[2] TIA's pilots were represented by the Teamsters until December, 1976, when they selected ALPA as their representative.

tendants intended to negotiate changes in their rates of pay, rules and working conditions. Conferences between the parties and efforts by the National Mediation Board to achieve settlement were unsuccessful. On August 8, 1977, concluding that mediation had failed, the Board released the parties to their self-help remedies. Additional efforts to reach settlement during the ensuing 30-day "cooling-off" period failed. Therefore, a strike was called for September 8, 1977.

On the last day of the "cooling-off" period, September 7, TIA filed two actions for injunctive relief.[3] The first complaint sought an injunction against the primary strike by the flight attendants, alleging that the Teamsters had bargained in bad faith; that strike action was foreclosed under the Order of the Civil Aeronautics Board (CAB) approving the TIA-Saturn merger; and that a strike against military operations would violate the expired collective-bargaining agreement. The second case was brought against the Teamsters and ALPA. Injunctive relief was requested to prevent TIA's flight engineers and pilots from honoring the flight attendants' picket lines pending arbitration of the question whether such sympathetic action was contractually permissible.[4]

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[3] Case No. C-77-2010 enjoining the flight attendants from striking military flights, an order the Teamsters appealed (No. 77-3362), and declining to enjoin the strike against commercial flights, an order the carrier cross-appealed (Nos. 77-3395, 77-3781). Case No. C-77-2011 enjoining the flight engineers and pilots with respect to military flights from which orders the Teamsters (No. 77-3363) and ALPA (No. 78-1148) appealed, and refusing injunctive relief with respect to commercial flights from which order TIA cross-appealed (Nos. 77-3395, 77-3781, 78-1232). This petition requests review of the Ninth Circuit's judgment in Nos. 77-3363, 77-3395 and 77-3781, which held that the district court had jurisdiction to enjoin the flight engineers' sympathetic action affecting military and commercial flights.

[4] The contract clauses in issue are set forth in the Appendix (A. 90a).

Decisions of the District Court

The district court declined to enjoin the flight attendants from striking TIA's commercial operations, holding that the case was controlled by RLA principles rather than the CAB's Order, and that the Teamsters Union had not violated its bargaining obligations under § 2, First of the Act. A preliminary injunction was issued against any strike affecting military flights on the basis of a military no-strike clause in the pre-merger TIA flight attendant agreement. Similarly, injunctions to prevent the flight engineers and pilots from respecting the flight attendants' picket lines around commercial flights were denied, whereas sympathetic action affecting military flights was enjoined. Relying on *Buffalo Forge Co.* v. *USW*, 428 U.S. 397 (1976), the court held that the Norris-LaGuardia Act, 29 U.S.C. § 104, prohibits issuance of an injunction against sympathetic action, where the underlying issue (the primary strike) is not arbitrable.

Buffalo Forge is applicable in the RLA context, the court reasoned, because sympathetic action is associated with a related major dispute in which self-help is permissible. Disputes caused by respect for fellow employees' picket lines have elements in common with major disputes that clearly distinguish them from other types of minor disputes in which self-help pending arbitration is impermissible. In addition, the court noted that sympathetic action could be enjoined pending arbitration in every case, if carriers can obtain injunctive relief simply by claiming that such action raises an issue of contract interpretation, thus depriving employees of crucial support from their fellow workers.

These considerations did not prohibit a military injunction, in the court's opinion, because military no-strike clauses appeared in the pilots' and engineers' agreements. Also, due to the military injunction against the flight

attendants, sympathetic action affecting military flights would generate an independent work stoppage in operations exempt from the primary dispute.

Developments Pending Appeal

Cross-motions for stay of the military strike injunctions, and for a temporary injunction against the commercial strike, were argued in the Ninth Circuit Court of Appeals on October 19, 1977. No decision was issued on these motions. The Teamsters were found in civil contempt of the military strike injunctions by the district court on November 1, 1977 (A. 23a), and were found later that week to have purged themselves of contempt (A. 27a). The strike ended in early January, 1978. On January 12, 1978, the parties executed a new collective-bargaining agreement that resolved all issues over which the strike began. TIA's flight attendants selected another union, the Association of Flight Attendants, to represent them on June 4, 1979. The court of appeals issued an order on July 5, 1979, directing the parties to show cause why the appeals should not be dismissed as moot. (A. 29a).

Decision of the Court of Appeals

On appeal, the Ninth Circuit panel held that the case was not mooted by the ending of the strike, the execution of a new collective-bargaining agreement, and loss of the Teamsters' certification to represent the flight attendants. It maintained that the parties had not settled the controversies which spawned this litigation because TIA's claim for compensatory fines for contempt of the preliminary injunction remained outstanding. Passing to the merits, the court of appeals upheld the district court's decision that the Teamsters had not breached their bargaining duty, and held that the lower court had acted without jurisdiction in specifically enforcing the military no-strike clause. The latter two issues are not presented by this petition.

On the other hand, the court of appeals held that the district court had jurisdiction to enjoin the flight engineers and pilots from honoring the flight attendants' picket lines around commercial and military flights until completion of the minor dispute mechanism established their right to engage in sympathetic action. It thought *Buffalo Forge's* reasoning inapplicable to the RLA, stating that considerations such as the avoidance of judicial intrusion into arbitrable disputes, the scope of permissible pre-arbitration remedies, and the effect of its decision on the settlement of disputes by arbitration, are not present here. Not only is arbitration a substitute for sympathetic action, in the Court's view, but maintenance of the status quo is appropriate to prevent a subsequent award from being meaningless where it is "clear" that sympathetic action violates a no-strike pledge.

The case was remanded to the district court for consideration of the contempt issue in light of the language of the no-strike clauses. Rehearing was denied, with the following statement by Judge Goodwin:

> "I would modify the majority opinion to hold that a sympathy strike is a major dispute if the work stoppage with which the sympathy strike is allied is a major dispute. I do not read the Railway Labor Act cases as extending to major disputes the power to enjoin." [A. 81a]

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW DIRECTLY CONFLICTS WITH A CONTROLLING PRECEDENT OF THIS COURT

The court of appeals' decision directly conflicts with *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418 (1911), where this Court held that the settlement, and consequent mootness, of the main action required dismissal of ancillary civil contempt proceedings.

> "[T]his was a proceeding in equity for civil contempt, where the only remedial relief possible was a fine, payable to the complainant. The company prayed 'for such relief as the nature of its case may require,' and when the main cause was terminated by a settlement of all differences between the parties, the complainant did not require, and was not entitled to, any compensation or relief of any other character. The present proceeding necessarily ended with the settlement of the main cause of which it is a part . . . ." [*Id.* at 451-52.]

Gompers implements familiar principles applicable to civil contempt actions which have never before been questioned. Without a final decree, an order of civil contempt cannot have any finality. *Fox* v. *Capital Co.*, 299 U.S. 105 (1936). The order becomes reviewable only upon appeal from the final decree. *Id.* The vitality of a preliminary injunction is derived from the main controversy; its validity, and that of any ancillary contempt order, depends upon the outcome of the main action. *Worden* v. *Searls*, 121 U.S. 14, 26-27 (1887). If, for any reason, the plaintiff is not entitled to a permanent injunction upon final hearing, the preliminary injunction falls and the civil contempt proceeding must be terminated.[5] *Gompers* v. *Buck's Stove & Range Co.*, *supra*, 221 U.S. 451-52. Termination of the main action necessarily requires termination of every proceeding dependent on it. *Id.* at 451.

Notwithstanding this well-established doctrine, the court below held that the district court is to "consider the question of the legal rights of the parties for the alleged contempt," even though it acknowledged that further proceedings would not otherwise be required (A.

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[5] *Pacific Gamble Robinson Co.* v. *Minneapolis & St. Louis Ry.*, 92 F. Supp. 352, 354 (D. Minn. 1950). See also *Parker* v. *United States*, 153 F.2d 66, 71 (1st Cir. 1946).

65a).[6] At present, then, the district court is to redetermine the propriety of the preliminary injunction it issued against the flight engineers, not for the purpose of entering a permanent injunction (that issue being moot),[7] but solely to adjudicate the contempt proceeding and order the payment of a compensatory fine, if appropriate. Trial on the merits and final judgment thereon, being elements of the mooter main action, have been dispensed with as unnecessary.

The lower court attempted to distinguish *Gompers* on the ground that the parties here had not settled the contempt proceeding. But likewise in *Gompers*, the main action[8] rather than the ancillary contempt proceeding was settled by the parties. The instant case cannot be so distinguished. The court of appeals' disregard of *Gompers*, and its insistence on further litigation of a moot injunction case so a civil contempt proceeding can continue, warrant exercise of this Court's supervisory authority. This case has been set on an impossible course which, if TIA prevails, will lead to an adjudication of contempt issues without a final judgment in the main injunctive action. For entry of a permanent injunction, which TIA neither required nor deserved after the dis-

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[6] The lower court said in reference to the sympathetic action issue: "If the strike were still in force we would remand this aspect of the case to the trial court for further consideration of the propriety of the injunction . . . . The strike having ended, however, such further proceedings are not required" (A. 65a).

[7] Compare *Local 8-6, OCAW* v. *Missouri*, 361 U.S. 363 (1960); *Harris* v. *Battle*, 348 U.S. 803 (1954) and *Barker Painting Co.* v. *Local 734, Painters Union*, 281 U.S. 462 (1930) with *Buffalo Forge Co.* v. *USW*, *supra*, 428 U.S. at 403. Due to their waiver, the petitioners could not have recovered on the injunction bond posted by TIA if this case had been dismissed. For this reason, and because no final decree has been entered here, *Liner* v. *Jafco, Inc.*, 375 U.S. 301 (1964), is inapposite.

[8] *Buck's Stove & Range Co.* v. *Gompers*, 219 U.S. 581 (1911).

pute causing the strike was fully settled, is forbidden by Article III's "case or controversy" requirement.[9] This fundamental consideration cannot be swept aside simply because a claim for civil contempt compensation is made.[10]

Moreover, in departing from settled principles, the decision of the court below necessarily will create confusion among the lower courts. Litigation which should be ended under *Gompers* will be kept alive. This is particularly true in the volatile labor relations field, at least where continued litigation would strengthen the position of one party or the other in terms of their collective-bargaining relationship. Considering the increasing demands on the resources of the lower federal courts, a doctrinal shift away from the rule of *Gompers* would be highly undesirable. The decision of the lower court should be reviewed now to foreclose such a development.

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[9] See authorities cited in note 7 *supra*.

[10] Relying on *Bituminous Coal Operators Ass'n* v. *UMW*, 585 F.2d 586 (3d Cir. 1978), where a civil contempt proceeding was allowed to continue after expiration of the injunction due to a pending damage claim, the court below could "perceive no constitutional distinction" between a claim for a compensatory contempt fine and a claim for damages authorized by statute (A. 39a). But it was the independent claim for damages asserted under § 301 of the LMRA, 29 U.S.C. § 185, that supplied the "case or controversy" which allowed the action in *Bituminous Coal* to proceed after the preliminary injunction had expired. In contrast, this case arises under the RLA which does not authorize the district courts to entertain damage suits for breach of contract. E.g. *Louisville & N. R.R.* v. *Brown*, 252 F.2d 149 (5th Cir. 1958), *cert. denied*, 356 U.S. 949 (1959). Here, as in *Gompers*, nothing remains before the district court other than a contempt proceeding under a preliminary injunction that cannot be made final.

II. THE LOWER COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, HAVING A PERVASIVE IMPACT ON AIRLINE INDUSTRIAL RELATIONS, CONTRARY TO THE RULINGS OF THIS COURT

A. The lower court's holding that sympathetic action in major disputes can be enjoined until its propriety is determined under the Act's minor dispute mechanism raises a question of major importance to the airline industry. It should be resolved by this Court instead of by a split panel decision of the court of appeals. The route structures of at least 27 carriers,[11] employing approximately 341,100 persons in 1979,[12] and accounting for 97.3 percent of total passenger traffic by certificated air carriers,[13] provide service within the Ninth Circuit. Each of these 27 carriers, which together employ 84.4 percent of the industry's total employment (404,100),[14] has collective-bargaining relationships with unions covering different crafts.[15] Since union representation is sys-

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[11] Thirty-six of the 55 certificated air carriers provide passenger service within the Ninth Circuit, while 27 of these carriers have 2 or more crafts or classes represented by unions. See Flight Itineraries, 6 Official Airlines Guide, North American Edition No. 23 (September 1, 1980); 45 National Mediation Board Ann. Rep. 26, Table 6b (1980); Airline Labor Contract Status Rep., Air Line Pilots Association (July 8, 1980). See also CAB, *Air Traffic Statistics*, *infra* note 13.

[12] See Civil Aeronautics Board, Schedules P-10 on file for carriers through December 31, 1979.

[13] See CAB, *Air Traffic Statistics* (May, 1980), based upon comparison of passenger revenue ton miles flown from May 31, 1979 through May 31, 1980.

[14] *Employment and Earnings*, July, 1980, U.S. DOL, BLS, Vol. 27, No. 7, at p. 97 (SIC 451, 2 includes all carriers, whether or not certificated, and freight operations).

[15] See note 11 *supra*.

temwide under the RLA, with minor exception, the industry's most important bargaining relationships stand to be affected by strike injunction suits filed in the Ninth Circuit under the lower court's ruling.[16] The exceptionally broad impact of the decision below warrants its immediate review.

B. The RLA establishes different mechanisms for the resolution of major disputes, involving changes in rates of pay, rules and working conditions, than for the settlement of minor disputes over grievances. Major disputes must be processed through lengthy procedures consisting of conferences between the parties, mediation by the Board, a proffer of voluntary arbitration, release of the parties to their self-help remedies, and a thirty-day "cooling-off" period. 45 U.S.C. §§ 155, 156. Legal "compulsions go only to insure that [these] procedures are exhausted before resort can be had to self-help . . . ." *BRT* v. *Jacksonville Terminal Co.*, 394 U.S. 369, *rehearing denied*, 394 U.S. 1024 (1969). Following exhaustion, in the absence of a settlement, economic self-help cannot be restrained in major disputes. *Id.* at 384-85.

Minor disputes, however, are resolved by adjustment boards; strikes over disputes properly referable to ar-

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[16] In *Bituminous Coal Operators Ass'n* v. *UMW*, *supra*, 585 F.2d at 592, the Third Circuit Court of Appeals found unpersuasive the district court's reliance on the fact that the employers' facilities were located in many different judicial circuits as a reason for denying injunctive relief, stating:

> "In an action seeking an injunction to enforce a contract, a court of equity acts in personam. As long as the court has jurisdiction over the defendant, the distant situs of the subject matter is not a bar to the exercise of the chancellor's powers. *Massie* v. *Watts*, 10 U.S. (6 Cranch) 148, 158-59, 3 L.Ed. 181 (1810); *Penn* v. *Lord Baltimore*, 1 Ves. 444 (Ch. 1750). Nor is it a bar to relief that a party has chosen for an in personam action a forum which he believes will be favorably disposed toward the selected remedy."

bitration can be enjoined to preserve the board's jurisdiction. *BRT* v. *Chicago, River & Ind. R.R.*, 353 U.S. 30 (1957). An injunction issued for this limited purpose effectuates Congress' intent to provide, in the RLA, machinery for the binding resolution of minor disputes without injuring the basic purpose of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* That purpose, this Court said, is "to protect working men in the exercise of organized, economic power, which is vital to collective bargaining." 353 U.S. at 40. *Chicago River* has no application to major disputes over changes in agreements.

The lower court recognized that Chicago River's rationale did not fit the instant case, in which the underlying dispute was major (not resolvable by arbitration) and the adjustment board's jurisdiction over the collateral minor dispute—*i.e.*, whether the engineers' right to honor the flight attendants' picket lines had been contractually waived—was not threatened. But the court below became distracted by what it perceived as a need to avoid disruption to the carrier's operations, and seized upon the Act's minor dispute machinery as a tool for use in halting that disruption. (A. 61a-62a). To limit injunctive relief to situations where "the relief will make it more likely that the dispute will be arbitrated," the panel majority said, "would be to adopt a somewhat crabbed view of the purpose of the RLA minor dispute procedures . . ." (A. 61a n.12). Then, totally disregarding Norris-LaGuardia's anti-injunction policy, the lower court held that sympathetic action integral to *major* disputes can be enjoined pending completion of the Act's minor dispute mechanisms for determining its legitimacy (A. 62a). Not explained was how arbitration could furnish "a reasonable alternative" for the crewmember's support for the flight attendants' position in their major dispute over a new contract. See 353 U.S. at 41.

The panel majority disregarded the precedential force of this Court's decision in *Buffalo Forge Co.* v. *USW*, *supra*, 428 U.S. 397, which held that the express prohibition of § 4 of the Norris-LaGuardia Act barred § 301 injunctive relief against sympathetic action pending decision by the arbitrator. *Id.* at 410. See generally *BRT* v. *Jacksonville Terminal Co.*, *supra*, 394 U.S. at 383. Unaccountably, the lower court relied on *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962), in concluding that *Buffalo Forge* does not govern this case. That *Atkinson* was expressly overruled in *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970), did not trouble the lower court. For it was unwilling to accept this Court's conclusion that the policies underlying the accommodation between the RLA's minor dispute procedures and the Norris-LaGuardia Act are no different than those which determine the availability of injunctive relief under § 301 of the LMRA. 398 U.S. at 252.

Under the decision below, pre-arbitration judicial intervention, in the nature of a preliminary injunction, is permitted where the employer can show a strong likelihood of ultimately prevailing in its interpretation of the no-strike clause and the inadequacy of other remedies. (A. 62a n.12). Thus, the district court is "to hold hearings, make findings of fact, interpret the applicable provisions of the contract and issue injunctions so as to restore the status quo . . . pending exhaustion of the arbitration process . . . ." *Buffalo Forge Co.* v. *USW*, *supra*, 428 U.S. at 410. Without question, even if the temporary injunction does not permanently settle the major dispute in the carrier's favor, as it often does, the adjustment board will "be heavily influenced or wholly preempted" by the court's findings and conclusions in the minor dispute. *Id.* at 412.

Of course, the panel majority attempted to find a policy in the RLA allowing the courts "to try and decide con-

tractual disputes at the preliminary injunction stage," *id.*, going so far as to offer its own interpretation of the collective-bargaining agreement (A. 64a n.14). But no such policy exists. "Congress considered it essential to keep . . . 'minor' disputes within the Adjustment Board and out of the courts . . . ." *Union Pac. R.R.* v. *Sheehan*, 439 U.S. 89, 94, *rehearing denied*, 439 U.S. 1135 (1979). Remarkably, the lower court authorized the very judicial intervention on the merits of minor disputes, on a pre-arbitration basis, that Congress expressly forbade in a post-arbitration setting.[17] The considerations that led this Court, in *Buffalo Forge*, to forbid pre-arbitration injunctions where, as here, there is no underlying dispute other than the strike itself to be arbitrated, apply with equal force to the instant case. The lower court's holding cannot be reconciled with *Buffalo Forge*.

In reality, the decision below has little to do with the arbitral resolution of minor disputes; rather, it is directed against disruption of the carrier's operations. The injunctive relief it sanctions has no purpose other than to minimize the economic pressure employees can exert in major disputes (A. 62a-63a). Thus understood, the lower court's artificial separation of the minor dispute (based on the flight engineers' sympathetic action) from the underlying major dispute, and its announcement that pre-arbitration strikes are prohibited, merely furnished a way for "issuing injunctions that would otherwise be forbidden by the Norris-LaGuardia Act." *Buffalo Forge Co.* v. *USW*, *supra*, 428 U.S. at 411. See also *BRT* v. *Jacksonville Terminal Co.*, *supra*, 394 U.S. at 384, foreclosing injunctive relief after the right of self-help accrues in major disputes.

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[17] Contrary to the lower court's opinion (A. 63a), *BLE* v. *Missouri-K-T R.R.*, 363 U.S. 528 (1960) furnishes no support for its conclusion that an independent action can be maintained for injunctive relief pending operation of the RLA's minor dispute procedures. *Id.* at 531 n.3.

Clearly the lower court's decision cuts to the heart of the federal anti-injunction policy, as embodied in the Norris-LaGuardia Act, without effectuating any corresponding labor policy established by Congress. This result is impermissible and requires review by this Court.

C. The Ninth Circuit panel apparently thought that its decision would have little impact on collective bargaining because the parties are required by the Act to establish adjustment boards (A. 60a). 45 U.S.C. § 184. Yet there is no requirement that unions agree to no-strike clauses. And, without some arguable contractual restraint, sympathetic refusals to cross a picket line would not result in a minor dispute referable to a board of adjustment. The decision below means that no-strike clauses will not be willingly given in bargaining, so the traditional right of employees to honor the picket lines of their fellow workers will be preserved.[18] Also, unions are likely to insist on common expiration dates for all agreements on the properties of individual carriers, thus enabling their simultaneous renegotiation. There will be much strife in the industry as unions pursue, and carriers resist, these new bargaining goals made necessary by the lower court's ruling. Its impact on collective bargaining is therefore very real.

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[18] E.g., *BRT* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), aff'd by an equally divided court, 385 U.S. 20 (1966); *BLFE* v. *Florida E. Coast Ry.*, 346 F.2d 673 (5th Cir. 1965); *Northwest Airlines, Inc.* v. *TWU*, 190 F. Supp. 495 (W.D. Wash. 1961). See also *BRT* v. *Jacksonville Terminal Co., supra*, 394 U.S. at 384; 45 U.S.C. § 152, Fourth.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID PREVIANT
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ROLAND P. WILDER, JR.
JOSEPH E. SANTUCCI, JR.

Attorneys for Petitioners, International Brotherhood of Teamsters, et al.

Dated: September 25, 1980

Supreme Court, U. S.
FILED
SEP 25 1980
MICHAEL RODAK, JR., CLERK

80-478

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AIRLINE DIVISION; TEAMSTERS LOCAL 2707; MARVIN G. GRISWOLD; TEAMSTERS LOCAL 732,

Petitioners,

v.

TRANS INTERNATIONAL AIRLINES, INC.,

Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID PREVIANT
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-77-2010 RFP

TRANS INTERNATIONAL AIRLINES, INC.,
Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, AIRLINE DIVISION: TEAMSTERS LOCAL 2707, AIRLINE, AEROSPACE AND ALLIED EMPLOYEES, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, et al.,

Defendants.

MEMORANDUM AND ORDER RE
FLIGHT ATTENDANTS

The plaintiff, Trans International Airlines, Inc. (TIA) is a large supplemental air carrier which transports both military and civilian passengers, as well as cargo. The present TIA is the result of the merger of TIA and another supplemental carrier, Saturn Airways, Inc. (Saturn), on November 30, 1976. At present, all of the flight attendants employed by TIA are represented by the defendant International Brotherhood of Teamsters (Teamsters) under a collective-bargaining agreement effective July 21, 1974. In February, 1976, the Teamsters served a notice of intent to amend the agreement under the terms of section 6 of the Railway Labor Act (RLA), and negotiations began. The agreement expired by its terms on April 1, 1976, but continued in effect while the parties exhausted the major dispute procedures of section 6 of the

RLA. The National Mediation Board assigned a mediator to the dispute on August 19, 1976. Almost one year later, in August, 1977, voluntary arbitration of the dispute was refused by the Teamsters, the mediator withdrew, and the 30-day cooling-off period began. The cooling-off period expired at midnight, September 7, 1977, exhausting the procedures of the RLA and, in the normal course, leaving the parties free to resort to self-help. However, TIA applied to this court on September 7 for a temporary restraining order in order to avert a strike scheduled to begin at midnight that night. This court issued such an order restraining all TIA flight attendants from striking, but the next day substantially modified that order so that it applied only to those flight attendants assigned to work on purely military flights. TIA now moves for a preliminary injunction against all striking flight attendants, and raises the same three issues as it did when seeking a temporary restraining order.

TIA's first contention is that a strike by the flight attendants would violate the requirements of a Civil Aeronautics Board order, CAB Order 76-5-60 (May 14, 1976), which imposed a set of labor protective provisions (LPP's) as a condition to approving the Saturn-TIA merger. LPP's are required by the CAB for the purpose of ensuring a smooth integration of the collective bargaining agreements of the merged corporation. For present purposes, the importance of the LPP's lies in their requirement that disputes concerning the rearrangement of employees upon merger, including disputes as to the seniority rights of the merged employees, must be submitted to binding arbitration. TIA asserts that since some seniority issues arising out of the merger have not yet been resolved, under the terms of the LPP's these issues must be submitted to arbitration; and consequently the Teamsters have no right to strike over them. The problem with this argument is that this strike has almost nothing to do with merger-related issues. Rather, the primary area of

disagreement between TIA and the Teamsters is with regard to the economic issues—wages, hours, and the like. These issues are regulated exclusively by the RLA, and the LPP's of the CAB order cannot apply to these issues which are wholly separate from the merger. It would be unreasonable to hold that just because some of the open issues in the negotiations for a new contract are merger-related, the union has waived its right to strike over any issue even though the mandatory procedures of the RLA have been completed. The purpose of the LPP's is merely to help ease the integration of two labor forces following a merger. Nothing in this purpose requires such a drastic curtailment of rights under the RLA.

TIA's second contention is that the Teamsters are not free to strike because they have not complied with the requirements of Section 2 First of the RLA, which requires all carriers and employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions . . ." This argument is based upon the Supreme Court's decision in *Chicago & N.W. Ry. Co.* v. *United Transportation Union*, 402 U.S. 570 (1971). That case held that Section 2 First is more than just a statement of policy, rather it imposes a judicially enforceable obligation to do more than just go through the motions of complying with the mandatory procedures of the RLA with no intention of reaching an agreement. TIA has introduced a substantial amount of evidence, including several affidavits, in its attempt to show that the Teamsters had no intention of reaching an agreement and were merely "going through the motions" in order to be free to initiate a strike against TIA. This evidence boils down to two major factual points. First, although the Teamsters originally proposed only 61 changes in the agreement in early 1976, in March of 1977 the Teamsters presented an entirely new proposal containing over 200 proposed changes. TIA argues that this increase in the outstanding issues is strongly indicative

that the Teamsters were not exerting a "reasonable effort to make . . . agreements." However, it is undisputed that for several months in late 1976, there was little active negotiation taking place between the parties because of the difficulties and uncertainties of consummating the proposed Saturn-TIA merger. In fact, negotiations did not get underway again in earnest until approximately the time the Teamsters introduced their new proposal. The testimony heard by the court on this matter indicates that what the Teamsters were trying to do with the introduction of their March, 1977, proposal was to integrate the old Saturn and old TIA agreements, taking the best from both. Since the carriers were newly merged and the Teamsters were now representing a larger group of flight attendants, it hardly seems unreasonable for them to modify their previous proposal substantially to meet the new conditions.

Second, TIA accuses the Teamsters of bad faith in that the union has refused over the course of 18 months of bargaining to bring their economic demands down to reasonable levels. As TIA calculates it, the Teamsters proposal that was on the table at the beginning of September, 1977, demanded wages, benefits, and working conditions that would cost TIA $12,600,000, or 294% of its present flight attendants' payroll (based on figures reported on IRS form W-2). TIA argues that this represents approximately three times TIA's total profits for fiscal year 1976, indicating almost *per se* that the Teamsters have not made a reasonable effort to reach an agreement. The union disputes these figures, particularly the estimated 294% cost increase of its proposal, but the court finds it unnecessary to the resolution of this question to determine the actual figures.

TIA is effectively asking the court to hold that the sheer size of the Teamsters' economic demands, and the distance between the parties after a long period of negoti-

ations, amounts to a lack of reasonable effort by the union to reach an agreement. The court can find no previous decision under the RLA, nor can TIA suggest one, which has inferred lack of reasonable effort solely from the size of the proposals put forth by the parties. Similarly, there does not appear to be any such decision under the roughly comparable "bad faith bargaining" standard of the National Labor Relations Act. Indeed, such a conclusion would seem to be precisely what the Supreme Court warned against in its *Chicago & N.W. Ry.* decision:

> [G]reat circumspection should be used in going beyond cases involving "desire not to reach an agreement," for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements.

402 U.S. at 579, n.11.

Furthermore, it appears that the negotiations between the parties have resulted in agreement in many significant areas, and there have been reductions in the Teamsters economic proposals. It is uncontested that, of the over 200 proposals the Teamsters put forth in March, 1977, only 85 open items remained as of September 7, 1977. Additionally, the Teamsters have reduced their economic demands on at least two occasions by fairly significant amounts. TIA itself has put forth only one complete proposal during the entire course of the negotiations. Under these circumstances, it is not unreasonable behavior for the Teamsters to refuse to unilaterally reduce their demands. It is clear to the court that both parties have been obstinate and unyielding in these negotiations. However, their behavior is much better characterized as simply hard bargaining rather than a conscious attempt by either side to avoid reaching an agreement. As the Southern District of New York concluded in a decision closely examining the cases in this area, "a party does not violate

its duty under the [Railway Labor] Act if it chooses to be adamant in its position." *REA Express, Inc.* v. *Brotherhood of Railway Clerks*, 358 F. Supp. 760, 772 n.43 (S.D.N.Y. 1971) (citing cases both prior to and after *Chicago & N.W. Ry.*).

TIA's final contention relates only to its military flights. The July 21, 1974 collective-bargaining agreement between the parties specifically provides as part of the No Strike-No Lockout provisions that:

> The Union further agrees that the Flight Attendants will continue to perform all duties which are necessary to enable the Company to operate flights for or in support of traffic sponsored by the Department of Defense of the United States of America, even though Flight Attendants withdraw from commercial airline service because of a dispute arising out of negotiations for a new contract after the expiration date of this Agreement and/or during and after all procedures of the Railway Labor Act have been exhausted. . . . [Art. XII, Sec. D.]

The clear import of this provision is to extend the no-strike obligation of the flight attendants beyond the term of the collective-bargaining agreement, even beyond the expiration of the 30-day cooling-off period mandated by the RLA, when the Teamsters would otherwise have the right to strike against all of TIA's operations. The Teamsters do not dispute the meaning of this provision, but argue that it is no longer in effect. During the negotiations, the Teamsters requested modification of the language of this clause. They argue that this provision, along with every other issue on which no agreement has been reached, has thus been "processed through" the procedures of the RLA and is no longer of any effect once the cooling-off period had ended. This argument might be correct with respect to the other clauses in the 1974 collective-bargaining agreement that are being renegoti-

ated, but it totally ignores the specific language of this provision. This military no-strike clause could not be clearer in expressing its intent that the flight attendants thereby give up their right to strike TIA's military flights even during those periods when they might strike all of TIA's other operations. This clearly expressed intent must prevail over any general rule that contact language which is being renegotiated is no longer effective following the 30-day cooling-off period.

Accordingly, it is hereby ORDERED that the defendant International Brotherhood of Teamsters, their officers, agents, representatives, members, servants, employees, and any and all persons acting in concert or participation with them, are hereby restrained from authorizing, inducing, causing participation in, or otherwise aiding and abetting in any concerted refusal to work and/or work stoppage by any TIA flight attendant assigned to work on any flight for or in support of traffic sponsored by the Department of Defense. In all other respects, the plaintiff's motion for a preliminary injunction with respect to TIA's flight attendants is denied.

It has come to the attention of the court that some TIA flight attendants working on military flights pursuant to the Temporary Restraining Order issued by this court on September 8, 1977, may have been stranded by TIA in cities away from their homes. Such treatment of TIA flight attendants violates in several respects the provisions of the parties' July 21, 1974, collective-bargaining agreement. These alleged actions on the part of TIA greatly concern the court, and would be considered by the court to be an abuse of TIA's contractual right to keep military flights operating during a flight attendants' strike if proven. The strandings are alleged to be designed to coerce individual flight attendants to break their legal strike against TIA's commercial flights. Therefore, counsel for TIA and the Teamsters are requested

to draft and submit to the court as soon as possible an order restraining TIA from stranding any flight attendants away from their home base in connection with the operation of any military flights during the remainder of this strike.

IT IS SO ORDERED.

Dated: September 26, 1977

/s/ Robert F. Peckham
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-77-2010 RFP

TRANS INTERNATIONAL AIRLINES, INC.,
Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, AIRLINE DIVISION; TEAMSTERS LOCAL 2707, AIRLINE, AEROSPACE AND ALLIED EMPLOYEES, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, et al.,

Defendants.

JUDGMENT

This action came on for hearing before the court, the Honorable Robert F. Peckham, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered upon plaintiff's motion for preliminary injunction,

IT IS ORDERED AND ADJUDGED that the defendant, International Brotherhood of Teamsters, its officers, agents, representatives, members, servants, employees, and any and all persons acting in concert or participation with them, are hereby restrained from authorizing, inducing, causing participation in, or otherwise aiding and abetting in any concerted refusal to work and/or work stoppage by any TIA flight attendant assigned to work on any flight for or in support of traffic sponsored by the Department of Defense.

That the plaintiff Trans International Airlines, Inc.'s motion for preliminary injunction is hereby denied in all other respects.

That the plaintiff, TIA, its agents, officers, employees and all other persons acting in concert with plaintiff shall take the following actions:

(1) Provide all flight attendants performing flight assignments in connection with the operation of military flights pursuant to the court's memorandum and order of September 26, 1977, with all benefits described in the flight attendants agreement in effect by its terms from July 1, 1974, to April 1, 1976, while said flight attendants are performing such work, or are located away from their domiciles by reason of having performed such work.

(2) Return all flight attendants located away from their domiciles by reason of having performed work in connection with military flights to their domicile at the end of their flight assignments in a manner consistent with the flight attendants agreement and past practice.

Dated: October 12, 1977

/s/ Robert F. Peckham
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-77-2011 RFP

TRANS INTERNATIONAL AIRLINES, INC.,
Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., AIRLINE DIVISION; TEAMSTER LOCAL 2707; MARVIN G. GRISWOLD; TEAMSTER LOCAL 732; AIRLINE PILOTS ASSOCIATION, INTERNATIONAL,
Defendants.

MEMORANDUM AND ORDER RE FLIGHT ENGINEERS AND PILOTS

This case raises the issue of this court's power to enjoin sympathy strikes under the Railway Labor Act (RLA). The plaintiff, Trans International Airlines, Inc. (TIA), is a supplemental air carrier, and is the surviving corporation of the merger of Saturn Airways, Inc. (Saturn) and TIA on November 30, 1976. All of the flight engineers presently employed by TIA are represented by defendant International Brotherhood of Teamsters (Teamsters), but under two different collective-bargaining agreements. Those flight engineers, as well as pilots and navigators, who were employed by TIA before the merger are governed by an agreement that went into effect July 21, 1974, while flight engineers formerly employed by Saturn came under an agreement effective November 17, 1974.

TIA's pilots are similarly divided. The pre-merger TIA pilots were represented by the Teamsters and they

still work under the July 21, 1974, contract. The former Saturn pilots, on the other hand, were represented by the Airline Pilots Association (ALPA), and they are governed by an agreement effective May 23, 1972. Since the merger, all of TIA's pilots have been represented by ALPA. All three of these collective-bargaining agreements are still in force, although they have been subsequently modified by letter agreements not relevant to this dispute.

The issues to be decided in this case involve the attempts by both groups of flight attendants and both groups of pilots to engage in a sympathy strike in support of a primary strike by TIA's flight attendants that commenced on September 9, 1977. The facts surrounding that labor dispute are fully set out in the court's memorandum and order of September 26, 1977, case No. C-77-2010 RFP. Prior to the commencement of the strike, on September 7, 1977, this court issued a temporary restraining order prohibiting all flight engineers from refusing to cross any picket lines. The next day, September 8, that order was substantially modified to restrain only former Saturn flight engineers and flight engineers working on TIA's military flights from honoring any picket lines. After listening to further argument on this matter at a hearing held on September 15, 1977, the court must now decide whether a preliminary injunction should issue. At the same time, the court also has before it TIA's application for a temporary restraining order to halt a sympathy strike by TIA pilots.

Whether or not these four groups of TIA employees have the right to engage in a sympathy strike must be determined by the terms of the applicable collective-bargaining agreement. The three agreements contain a variety of relevant language—general no-strike pledges,

picket line clauses, and military no-strike provisions.[1] All parties agree that any dispute over the proper con-

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[1] PRE-MERGER TIA FLIGHT ENGINEERS AND PILOTS
(Agreement of July 21, 1974)

"SECTION 21

A. [General No Strike Clause] During the term of this Agreement, the Union shall not authorize, cause, sanction or engage in any strike, picketing, slowdown or stoppage of work.

. . .

D. [Military No Strike Clause] The Union further agrees that the Crewmembers will continue to perform all duties which are necessary to enable the Company to operate flights for or in support of traffic sponsored by the Department of Defense of the United States of America, even though such Crewmembers withdraw from commercial airline service because of a dispute arising out of negotiations for a new contract after the expiration date of this Agreement and/or during and after all procedures of the Railway Labor Act have been exhausted, . . .

E. [Picket Line Clause] It shall not be a violation of this Agreement, and it shall not be a cause for discharge or disciplinary action in the event a Crewmember refuses to go through or work behind a legal primary picket line maintained by the Union in connection with a dispute between the Company and the Union involving any flight personnel represented by the Union."

FORMER SATURN FLIGHT ENGINEERS
(Agreement of November 17, 1974)

"Section 24

. . .

L. [General No Strike Clause] The Company will not lock out any employees covered by this Agreement and the Union and its members, individually and collectively, agree that they will not authorize or take part in any strike or picketing at the Company's premises during the life of this Agreement, until the procedures for settling disputes involving employees covered by this Agreement, as provided for by the Railway Labor Act, have been exhausted by both parties.

. . .

P. [Military No Strike Clause] Conduct of Military Operations—It is mutually agreed that during the term of the Agreement between the Company and its Flight Engineers as repre-

struction of these clauses is a "minor dispute" under the RLA, which either the employer or the union may take to binding arbitration. RLA Section 3, First, 45 U.S.C. § 153, First. The Teamsters and ALPA argue that their members have the right to honor the flight attendants' picket lines under the terms of the three applicable collective-bargaining agreements. As to all three agreements, TIA disagrees with the unions' reading of the agreements, and wishes to take the dispute to arbitration. Central to TIA's claim for relief is its assertion that the Supreme Court's decision in *Brotherhood of Railroad Trainmen* v. *Chicago River & I.R. Co.*, 353 U.S. 30 (1957), requires this court to enjoin any actions by the unions which would alter the status quo pending arbitration of this minor dispute. A brief look at the historical development of this area of labor law is necessary to determine the correctness of TIA's assertion.

The *Chicago River* decision, *supra*, created an exception to the general command of section 4 of the Norris-

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sented by the Union, that the Flight Engineers will not engage in any strike or work stoppage on purely military operations conducted by the Company."

FORMER SATURN PILOTS

(Agreement of May 23, 1972)

This contract contains no general no-strike agreement as such, although it does, in Section 26 C 12, reserve to each party all the rights and privileges accorded under the provisions of the Railway Labor Act.

"Section 29

. . .

K. [Military No Strike Clause] In the interest of national defense and in the event of the withdrawal from service from Saturn Airways, Inc., of crew members covered by this agreement, essential military services shall be permitted to operate; provided however, that this policy shall only pertain to those flights that are solely and completely military in nature and whose entire cargo is comprised of military commodities or military personnel."

LaGuardia Act, 29 U.S.C. § 104, that federal courts should not issue injunctions in labor disputes. The Court held there that an injunction could issue to prevent a strike while minor disputes were arbitrated as required by the RLA. The minor disputes in that case were 21 individual grievances; claims for additional compensation or for reinstatement. The Court's reasoning was that it was the intent of Congress to bring about stability in the labor relations of "this most important national industry," where a strike meant disruption and economic injury to a great many people. Therefore, Congress saw fit to ban outright strikes within the industry over individual grievances. Although the Court spoke in general terms, using the statutory phrase "minor disputes," it is evident that the Court was primarily concerned with preventing strikes over everyday grievances.[2] In the years since this decision, however, the rule of *Chicago River* has been applied very broadly. Federal courts have routinely issued injunctions against any strike action, including sympathy strikes, where any minor dispute has been found to exist. *Hughes Air Corp.* v. *Airline Pilots Assoc.*, No. 71-3034 (9th Cir., Jan. 7, 1972); *Northwest Airlines, Inc.* v. *Airline Pilots Assoc.*, 442 F.2d 246 (8th Cir. 1970), *reaffirmed* 442 F.2d 251 (1971), *cert. denied*, 404 U.S. 871 (1971).[3]

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[2] This can be most clearly seen in the court's characterization of minor disputes as "controversies over the meaning of an existing collective-bargaining agreement in a particular fact situation, generally involving only one employee." 353 U.S. at 33.

[3] In 1974, this court issued a temporary restraining order in a sympathy strike situation similar to the one in this case and involving some of the same parties. Saturn Airways, Inc. v. International Brotherhood of Teamsters, Civ. No. C-14-1305 RHS (N.D. Cal. 1974). This decision, like those cited in the text, was pre-*Buffalo Forge* and is distinguishable for the reasons set forth in this memorandum.

The analagous situation under the National Labor Relations Act, on the other hand, was originally resolved the opposite way. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962), held that a strike over an issue the parties expressly agreed to arbitrate could not be enjoined because of the prohibition of section 4 of the Norris-LaGuardia Act. However the Court in *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970), overruled *Sinclair Refining* and stated in broad language that a no-strike clause could be enforced by a federal court injunction pending arbitration under a broad arbitration clause. *Boys Markets*, like *Chicago River* before it, was thereafter applied automatically by most federal courts. If a broad arbitration clause was accompanied by a no-strike pledge and the dispute was arguably arbitrable, an injunction would almost invariably issue, even against sympathy strikes. *NAPA Pittsburgh, Inc.* v. *Automotive Chauffeurs*, 502 F.2d 321 (3d Cir. 1974) (en banc); *Island Creek Coal Co.* v. *Mine Workers*, 507 F.2d 650 (3d Cir. 1975); *Armco Steel Corp.* v. *Mine Workers*, 505 F.2d 1129 (4th Cir. 1974); *Valmac Industries* v. *Food Handlers*, 519 F.2d 263 (8th Cir. 1975), *vacated* 428 U.S. 906 (1976). *Contra, Amstar Corp.* v. *Meat Cutters*, 468 F.2d 1372 (5th Cir. 1972).

This mechanical approach was recently rejected outright by the Supreme Court in *Buffalo Forge, Inc.* v. *Steelworkers*, 428 U.S. 397 (1976). *Buffalo Forge* explained that *Boys Markets* established only a narrow exception to the general prohibition of the Norris-LaGuardia Act. In the case of sympathy strikes, where the underlying issue (the primary strike) is not arbitrable, the Court held that Norris-LaGuardia still prohibits the issuance of an injunction to halt the strike. There are compelling reasons for reaching this result. If the employer can obtain an injunction just by raising an arbitrable issue of contract interpretation, then sympathy strikes could be enjoined in every case pending arbitra-

tion. It is almost always possible to dispute in good faith the meaning of even the clearest contract language intended to give a union the right to honor another's picket lines. A union's hard won contractual right to engage in sympathy strikes would be lost for that critical period at the beginning of the primary strike when support for the strike from other unions is generally most crucial. The core meaning of *Buffalo Forge* then, is that sympathy strikes present a different situation than strikes over grievances concerning the terms and conditions of employment and that the logic of *Boys Markets* is thus not applicable to the sympathy strike situation. Rather, a fresh analysis of the situation is required.

The court can discern no reason why this teaching of *Buffalo Forge* should not be equally applicable to the RLA and the *Chicago River* decision. Although there are fundamental differences between the RLA and the NLRA, and only rough analogies may be drawn between the two statutory schemes, nevertheless the core reasons for reaching the *Buffalo Forge* result are just as compelling in the RLA context as under the NLRA. This case presents a situation greatly resembling that in *Buffalo Forge*. In fact, the former Saturn flight engineers and pilots are identically situated with the union members in *Buffalo Forge*. These employees have a no-strike pledge in their agreement, but contend that this does not prevent them from honoring the flight attendants' picket lines. The pre-merger TIA flight engineers and pilots, on the other hand, present an even more compelling case for reaching the *Buffalo Forge* result, for their contract contains an express provision permitting the honoring of picket lines. If TIA can obtain an injunction against a sympathy strike here by simply disputing the interpretation of the picket line clause, these employees will have effectively lost the benefit of this bargained-for contract provision.

The result reached here does not conflict with the policies underlying the RLA and the *Chicago River* de-

cision. The RLA provides for the mandatory arbitration of minor disputes, and *Chicago River* permits an injunction pending their arbitration, in order to minimize interruptions in the operation of the vital industries covered by the RLA. However, the RLA does permit strikes in "major disputes," disputes stemming from the bargaining over a new contract. The primary strike by the flight attendants which underlies this case is just such a permitted strike, for the RLA's prerequisites to striking have all been completed. Commerce is already being disrupted and TIA already has a strike on its hands with the full blessing of the RLA. A sympathy strike possibly may enhance the effectiveness or the extent of the work stoppage, but there is by definition already an underlying primary strike. Disagreement over a union's right to honor picket lines is a minor dispute within the RLA definition. But a sympathy strike situation under the RLA will always be associated with a related major dispute, and it has elements in common with the major dispute that clearly distinguish a sympathy strike from other types of minor disputes. The court thus finds the rationale of *Chicago River* to be inapplicable here in light of the teaching of *Buffalo Forge* and the compelling reasons for following that decision outlined above.

In one important respect, however, the facts of this case significantly differ from those in *Buffalo Forge*. All three collective-bargaining agreements before the court contain a special military no-strike clause in addition to any general no-strike pledge. Both the agreements for the pre-merger TIA flight engineers and pilots, and for the former Saturn pilots clearly state that military flights are to be continued even if the union lawfully strikes all other flights. These special provisions are required by the terms of the Department of Defense contracts with TIA in order to assure continued service for the military. It would be going well beyond the facts of *Buffalo Forge* for this Court to hold that because the

union can generate a minor dispute requiring arbitration over the meaning of these clauses, no injunction should issue pending arbitration. This would pervert *Buffalo Forge*, for the employer would then lose the benefit of its bargain that military flights would continue during a strike. Furthermore, since the flight attendants have a similar clause in their agreement and accordingly have been enjoined from extending their strike to military flights, any sympathy strike of military flights would do more than just supplement a preexisting work stoppage. Rather, such a sympathy strike would involve a separate and distinct work stoppage in an area of TIA's operations exempt from the primary strike. This would strongly conflict with the aim of the RLA to reduce strikes to an absolute minimum, and the court thus does not feel that an extension of *Buffalo Forge* to the situation regarding military flights would be appropriate. Although the court holds that the principles of *Buffalo Forge* do apply to the RLA, the differences between the statutory schemes of the RLA and NLRA demand great caution in applying that case beyond its facts to the RLA context.

Accordingly, it is hereby ORDERED that the defendant International Brotherhood of Teamsters, as representative for all of TIA's present flight engineers, their officers, agents, representatives, members, servants, employees, and any and all persons acting in concert with them, are hereby enjoined from authorizing, inducing, causing participation in, or otherwise aiding and abetting in any concerted refusal to work, sympathy strike, or honoring of picket lines with respect to military flights under the military no-strike clauses of the applicable collective-bargaining agreements. Plaintiff TIA's motion for preliminary injunction with respect to its flight engineers is hereby denied in all other respects.

Furthermore, it is hereby ORDERED that defendant Airline Pilots Association, as representative for all of

TIA's present pilots, their officers, agents, representatives, members, servants, employees, and any and all persons acting in concert with them, are hereby restrained from authorizing, inducing, causing participation in, or otherwise aiding and abetting in any concerted refusal to work, sympathy strike, or honoring of picket lines with respect to military flights under the military no-strike clauses of the applicable collective-bargaining agreements. Plaintiff TIA's motion for a temporary restraining order with respect to its pilots is hereby denied in all other respects. This temporary restraining order to remain in effect until a determination is made with respect to TIA's motion for a preliminary injunction, but in any case for no more than 10 days.

Dated: September 28, 1977

/s/ Robert F. Peckham
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-77-2011 RFP

TRANS INTERNATIONAL AIRLINES, INC.,
Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AIRLINE DIVISION, TEAMSTERS LOCAL 2707, AIRLINE, AEROSPACE AND ALLIED EMPLOYEES,
Defendants,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL (AFL-CIO),
Defendant.

JUDGMENT

This action came on for hearing before the court, the Honorable Robert F. Peckham, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered upon plaintiff's motion for preliminary injunction,

IT IS ORDERED AND ADJUDGED that the defendant, International Brotherhood of Teamsters, as representative for all of TIA's present flight engineers, its officers, agents, representatives, members, servants, employees, and any and all persons acting in concert with them, are hereby enjoined from authorizing, inducing, causing participation in, or otherwise aiding and abetting in any concerted refusal to work, sympathy strike, or honoring of picket lines with respect to military flights under the military no-strike clauses of the applicable collective-bargaining agreements.

That the plaintiff Trans International Airlines, Inc.'s motion for preliminary injunction is hereby denied in all other respects.

Dated: October 12, 1977

/s/ Robert F. Peckham
United States District Judge

ENTERED IN CIVIL DOCKET 10/14, 1977.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-77-2010 RFP
No. C-77-2011 RFP

TRANS INTERNATIONAL AIRLINES, INC.,
Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, etc., AIRLINE DIVISION; TEAMSTERS LOCAL 2707; MARVIN G. GRISWOLD; TEAMSTER LOCAL 732; HENRY BREEN; and DANIEL PORTER;

Respondents.

ADJUDICATION OF CONTEMPT

This Court having read and considered the first amended petition for adjudication in civil contempt, the affidavit in support thereof, and being fully advised in the premises, after hearing, this Court specifically finds as follows:

1. That respondents International Brotherhood of Teamsters, etc., Airline Division; Teamster Local 2707; Marvin G. Griswold; Teamster Local 732; Henry Breen; and Daniel Porter have, beginning Sunday, October 30, 1977 and continuing to the date of this order, authorized, induced, caused participation in, and otherwise aided and abetted a concerted refusal to work and/or work stoppage directed to flights of plaintiff operated for the Department of Defense, so-called "military flights," by, *inter alia*, specifically instructing Teamster flight attendants and flight engineers to refuse to fly all such military flights, causing Teamster flight attendants to

be unavailable to fly military flights by claiming sickness, causing Teamster members to block access, engage in mass picketing, and engage in acts of violence and harassment against plaintiff's employees seeking to report for work and applicants for employment with petitioner at petitioner's facilities, and generally encouraging failure of compliance by Teamster flight attendants and flight engineers with the preliminary injunction orders of this Court issued September 26 and September 28, 1977.

2. That the actions described in Paragraph 1 are in violation of this Court's preliminary injunctions issued September 26, 1977 in Case No. C-77-2010 RFP and September 28, 1977 in Case No. C-77-2011 RFP, which orders are presently binding upon the above-named respondents and in full force and effect.

3. That the actions described in Paragraph 1 will continue unless restrained.

4. That denial of this order would result in irreparable injury to the petitioner in that the actions described in Paragraph 1 will cause immediate substantial and irreparable injury, loss, and damage to the petitioner and to the public in general.

WHEREFORE, in view of the above findings, IT IS HEREBY ADJUDGED, ORDERED AND DECREED:

1. That respondents named in Paragraph 1 above are, individually and severally, in civil contempt of this Court's preliminary injunction orders of September 26 and September 28, 1977.

2. That said respondents, and each of them, shall forthwith purge themselves of said civil contempt in the following manner:

(a) By immediately complying with the Court's preliminary injunction orders dated September 26 and September 28, 1977;

(b) By preparing a notice describing said orders and acknowledging that respondents have been adjudicated in civil contempt and are in the process of complying with said orders, and urging all persons concerned to comply with said orders, such notice to be signed by an authorized representative of respondents and posted in conspicuous places on petitioner's bulletin boards at every base, until further order of this Court, without alteration, defacing, or otherwise rendering said notices illegible or difficult to read;

(c) By preparing a Code-a-Phone tape recorded message embodying the information set forth in subparagraph (b) above, such Code-a-Phone message to be substituted for the Code-a-Phone message or messages presently being transmitted to Teamster members and to continue to be transmitted until further order of this Court;

(d) By immediately sending by certified mail a signed copy of the above-described notice to every flight attendant and flight engineer member of the Teamsters Union employed by petitioner;

(e) By using every other reasonable means to contact and notify flight attendant and flight engineer employees of petitioner of the necessity for complying with this Court's preliminary injunction orders.

3. To insure compliance with this order, and with the provisions of the contempt adjudication, IT IS FURTHER ORDERED that respondents, and each of them, are hereby assessed a prospective compliance fine in the amount of fifty thousand dollars ($50,000) and an additional fine for each day the contempt of this Court's Preliminary Injunction Orders shall continue, which additional fine shall be seventy five thousand dollars ($75,000) for the second day thereof, and shall increase by an additional twenty five thousand dollars ($25,000)

on the third and each successive day thereafter; provided, that if the respondents purge themselves of contempt as herein above and below set forth and make a good faith showing as described in paragraph 4 that they have made and are making all reasonable endeavors to accomplish such purging, then the imposition of all such fines shall be suspended pending the further determination by this Court as to whether the purging shall have been accomplished.

4. By not later than 4:00 pm November 2, 1977 respondents shall submit to this Court a written and sworn statement setting forth the steps they have taken to comply with this Court's Preliminary Injunction Orders; a further report of the same type shall be submitted to this Court five days following the initial report, setting forth every additional action taken by respondents to comply with and to ensure compliance with this Court's Preliminary Injunction Orders.

5. The matters of award of compensation to the plaintiff, of attorneys fees and costs, if any, and of any further hearings on past violations of this Court's Injunctive Orders are reserved for future determination by the regularly assigned District Judge, the Honorable Robert F. Peckham. Hearing on the calendar of Judge Peckham is hereby fixed for Wednesday, November 9, 1977 at 9:30 am.

DATED: November 1, 1977 at —— pm.

/s/ Cecil F. Poole
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C-77-2010 RFP
C-77-2011 RFP

TRANS INTERNATIONAL AIRLINES, INC.,
Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, etc., AIRLINE DIVISION; TEAMSTERS LOCAL 2707; MARVIN G. GRISWOLD; TEAMSTER LOCAL 732; HENRY BREEN; and DANIEL PORTER;
Respondents.

FINDINGS AND CONCLUSIONS RE: PURGING OF CIVIL CONTEMPT

This matter having come before the Court on November 4, 1977 at 11:00 a.m. for further hearing to determine whether defendants had taken appropriate actions to purge themselves of contempt; and the Court having heard and duly considered the evidence and arguments of the parties, the Court hereby finds and concludes as follows:

1. Plaintiff alleges, *inter alia,* that Defendants failed to purge themselves of contempt by continuing to engage in mass picketing after the Adjudication of Contempt. The parties are in dispute as to the intent and meaning of the Adjudication of Contempt insofar as it relates to mass picketing. Plaintiff contends that mass picketing as used therein refers to any picketing by an excessive number of persons. Defendants contend that mass picketing as used therein refers only to picketing

which has the effect of physically obstructing ingress and/or egress at Plaintiff's facilities and thereby interfering with the flying of military flights. The Court believes that this dispute as to the intent and meaning of the Adjudication of Contempt can best be resolved by Judge Poole who issued the Adjudication of Contempt. Accordingly, to the extent that Plaintiff continues to allege that Defendants failed to purge themselves of contempt by continuing to engage in mass picketing Plaintiff is directed to refer said matter to Judge Poole.

2. In all other respects Defendants have established, and Plaintiff admits, that Defendants have purged themselves of contempt by taking all actions required by the Adjudication of Contempt.

Dated: November 8, 1977

/s/ Charles B. Renfrew
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 77-3362
77-3363
77-3395
77-3781

TRANS INTERNATIONAL AIRLINES, INC.,
Appellant, Cross-Appellee,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, AIRLINE DIVISION, TEAMSTERS LOCAL 2707, AIRLINE, AEROSPACE and ALLIED EMPLOYEES; MARVIN G. GRISWOLD; TEAMSTERS LOCAL 732,
Appellees, Cross-Appellants.

Nos. 78-1148
78-1232

TRANS INTERNATIONAL AIRLINES, INC.,
Appellee, Cross-Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, AIRLINE DIVISION, TEAMSTERS LOCAL 2707, and AIRLINE PILOTS ASSOCIATION INTERNATIONAL, AFL-CIO,
Appellants, Cross-Appellees.

Appeal from the United States District Court
for the Northern District of California

ORDER

Before: GOODWIN, WALLACE, and KENNEDY, Circuit Judges.

It is ordered that the appeal herein be dismissed as moot, unless one or more parties, by affidavit, show cause on or before July 26, 1979, and identify with particularity the issues, if any, of law or fact which constitute a case or controversy within the meaning of Article III of the United States Constitution and *Illinois State Board of Elections* v. *Socialist Workers Party*, 47 U.S.L.W. 4197, 4201 (U.S., Feb. 22, 1979).

(Filed July 5, 1979)

APPENDIX F

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 77-3362, 77-3363, 77-3395, 77-3781,
78-1148 and 78-1232

TRANS INTERNATIONAL AIRLINES, INC.,
Plaintiff-Cross-Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, etc., AIRLINE DIVISION, TEAMSTER LOCAL 2707; MARVIN G. GRISWOLD; TEAMSTER LOCAL 732,
Defendants-Cross-Appellees.

TRANS INTERNATIONAL AIRLINES, INC.,
Plaintiff-Appellee/Cross Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al., AIRLINE DIVISION, TEAMSTERS LOCAL 2707, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO,
Defendants-Appellants/Cross Appellees.

Decided February 14, 1980, as amended by Orders of March 14 and June 2, 1980

Appeal from the United States District Court
for the Northern District of California

Before GOODWIN, WALLACE, and KENNEDY, Circuit Judges.

KENNEDY, Circuit Judge:

This case requires a determination, among other matters, of the extent to which the anti-injunction mandate

of the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, is applicable to common carriers and collective bargaining units subject to and regulated by the Railway Labor Act (RLA), 45 U.S.C. §§ 151 *et seq.*[1] The RLA extends to airlines, 45 U.S.C. §§ 181-188, and Trans International Airlines (TIA), a principal party in this case, is one of the nation's largest supplemental air carriers. On November 30, 1976, TIA merged with Saturn Airways. The company operates separate flights for military and civilian carriage, transporting passengers and freight on both kinds of flights. At issue are two strikes against TIA, a primary strike by TIA's flight attendants and a sympathy strike by its flight engineers and pilots. At the time of the events in question both the flight attendants and the engineers are represented by the International Brotherhood of Teamsters, Airline Division (Teamsters). TIA's pilots are represented by the Air Line Pilots Association (ALPA), which also represented the premerger Saturn pilots.[2] The company obtained federal injunctive relief prohibiting both strikes to the extent they were directed to military flights, but the district court did not enjoin the strikes against civilian flights. Both the company and the affected Teamsters unions appeal from the rulings.

The contract negotiations between the Teamsters and the company, and the subsequent strikes, have the following history. TIA and the flight attendants were parties

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[1] Although we ultimately hold that the Norris-LaGuardia Act deprives the federal courts of jurisdiction to enjoin the primary strike in this case, federal question jurisdiction is conferred by 28 U.S.C. §§ 1331 & 1337, since the enforceability of the contract clauses at issue and the propriety of granting injunctive relief arise under the various sections of RLA, 45 U.S.C. §§ 151 *et seq.*

[2] The Teamsters and ALPA stand in the same position with regard to the sympathy strike issues addressed below. Where appropriate, we use "Teamsters" or "the union" to refer to ALPA as well as the Teamsters.

to a collective bargaining agreement for the period July 21, 1974 to April 1, 1976. The agreement contained a general no-strike clause, effective "during the term of this agreement." At the heart of the dispute over the legality of the primary strike lie further contract provisions, by which the parties agreed there would be no strikes against military flights and that this clause was effective "after the expiration of this agreement and/or during and after procedures of the Railway Labor Act have been exhausted . . .." [3] In February of 1976 the Teamsters, acting for the flight attendants, served a notice of intent to amend the agreement. Under the Railway Labor Act this is a section 6 notice, which

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[3] The relevant contract provisions provide:

ARTICLE XII

No Strike—No Lockout

Section A. During the term of this Agreement, the Union shall not authorize, cause, sanction or engage in any stirke, picketing, slowdown or stoppage of work.

Section B. During the term of this Agreement, the Company shall not cause, permit, or engage in any lockout of its Flight Attendants.

Section C. During the term of this Agreement, the Company reserves the right to discharge or otherwise discipline any Flight Attendant taking part in any strike, picketing, slowdown or stoppage of work.

Section D. The Union further agrees that the Flight Attendants will continue to perform all duties which are necessary to enable the Company to operate flights for or in support of traffic sponsored by the Department of Defense of the United States of America, even though such Flight Attendants withdraw from commercial airline service because of a dispute arising out of negotiations for a new contract after the expiration date of this Agreement and/or during and after all procedures of the Railway Labor Act have been exhausted, provided the Company shall submit to the Union, when requested, proof that a particular flight is being flown or operated under charter or contract to the Department of Defense.

signals the union's intent to negotiate a new employment agreement. 45 U.S.C. § 156. The contract expiration date (April 1, 1976) arrived without the parties having reached accord. Pursuant to the provisions of the Railway Labor Act, the agreement remained in force during the dispute resolution procedures set in motion by the section 6 notice. *See id.* Further negotiations between the parties produced no agreement, and a mediator was assigned by the National Mediation Board on August 19, 1976.

The union refused voluntary arbitration, the mediator withdrew, and after expiration of the statutory 30-day cooling off period expired at midnight, September 7, 1977, the flight attendants struck all flights. TIA's flight engineers and pilots, in a sympathy strike, honored the flight attendants' primary strike and refused to cross the picket line.

TIA applied to the district court for an order prohibiting these groups of employees from striking. The district court ultimately granted a preliminary injunction prohibiting the flight attendants from striking TIA's military flights, but denied an injunction prohibiting flight attendants from striking TIA's other operations. A similar injunction was issued against the flight engineers and pilots, enjoining the sympathy strike as to military flights only.

In this court, the Teamsters moved to stay the military strike injunctions, and TIA moved for temporary injunctive relief pending decision of the appeal. Oral argument on these motions was heard by this panel. In addition to the motions for preliminary relief, the principal appeal from the district court's preliminary injunctions is pending before this circuit. Further, TIA and ALPA have filed separate appeals. Some of the issues raised in these appeals were not argued in the parties' motions for interim relief. Concluding, however, that

further oral argument in these cases is unnecessary, these appeals, Nos. 77-3362, 77-3363, 77-3395, 77-3781, 78-1148 & 78-1232 are considered submitted to this panel on the date of filing of this opinion, and their disposition is controlled by this opinion.

In general, three contentions are advanced by the parties. First, quite apart from the argument that federal courts are prohibited by statute from enjoining the strikes, the Teamsters contend that TIA was not entitled to seek a preliminary injunction because the company's actions during the strike were so unfair that the company had unclean hands. In summary, the Teamsters claimed that TIA improperly stranded flight attendants at foreign ports; hired replacements; expanded the number of military flights (which the district court had enjoined the flight attendants, engineers and pilots from striking); terminated pilots for refusal to fly commercial planes or for other carriers; refused sick pay and monthly guarantees to strikers; and violated seniority rights in the selection of pilots for the military flights.

Second, TIA argues that the Teamsters' conduct during the course of the major disputes mediation procedures violated section 152 First of the RLA, which requires parties "to exert every reasonable effort to make" a collective bargaining agreement. If that were so, there would be authority to enjoin the strike and require the Teamsters to return to the bargaining table. *See Chicago & N. W. Ry.* v. *United Transportation Union*, 402 U.S. 570, 91 S.Ct. 1731, 29 L.Ed.2d 187 (1971). The principal bases of TIA's claim are (1) that the Teamsters, in the process of negotiating the integration of the premerger Saturn and TIA flight attendant agreements, more than doubled the number of proposals on the bargaining table by requesting approximately 200 contract changes after a year of negotiations and six months prior to the strike,

and (2) that the cost of the Teamsters' initial proposal for flight attendants exceeded 250% of TIA's then-present payroll costs for TIA flight attendants, and its proposals after mediation by the National Mediation Board exceeded 200% of TIA's total company-wide profits for 1976 and represented a 294.6% increase in flight attendant payroll costs.

Finally, even if enjoining the Teamsters' strike was not proper because of the union's bargaining tactics, TIA contends an injunction against strikes of military flights was proper because, among other reasons, the various groups of employees had promised not to strike TIA's military operations, even after bargaining under the RLA's disputes resolution procedures had been exhausted, and that an injunction against the sympathy strikes was proper pending minor dispute arbitration of the legality of the strikes.

The strikes which were the subject of this lawsuit have been settled, and a new collective bargaining agreement was signed on January 12, 1978.[4] We must first decide whether this appeal is not moot.

We hold these appeals are not moot, primarily because resolution of the issues presented is crucial to deciding a substantial pending claim for damages sought by TIA against the Teamsters. The district court's preliminary injunctions were entered on September 26, 1977, and September 28, 1977. On October 26, 1977, the district court entered a further order in which it rejected the Teamsters' and ALPA's claim that TIA had "unclean hands" and thus was not entitled to the injunctions. This order formed the basis for appeals number 78-1148 and 78-1232. The Teamsters continued to urge employees to

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[4] The contracts between TIA and its flight attendants, engineers, and pilots contain the same military no-strike clause which is discussed at greater length below.

strike military flights. On November 1, 1977, the Teamsters were adjudicated in contempt of the district court's orders. TIA alleges its military operations were virtually shut down by striking flight attendants and flight engineers, causing TIA approximately $400,000 in compensatory damages which it still seeks to recover from the Teamsters. The matter of compensatory fines was stayed by the district court on January 24, 1978, "pending the results of the appeals before the Court of Appeals for the Ninth Circuit in *TIA* v. *Teamsters*, Nos. 77-3362/3363/3395/3781."

Thus, the right of TIA to recover its alleged damages and the extent of recovery will be controlled, in part, by resolution of the overriding issue in these appeals: whether TIA was entitled to injunctive relief against either the primary or the sympathy strike. *See, e.g., Lewis* v. *S. S. Baune*, 534 F.2d 1115, 1119 (5th Cir. 1976) ("A judgment of civil contempt, being remedial in nature, stands or falls with the validity or invalidity of the order, and the opposing party should be compensated only if he was entitled to the order."); *Latrobe Steel Co.* v. *United Steelworkers*, 545 F.2d 1336, 1345-46 (3d Cir. 1976). Under these circumstances this appeal presents a live case or controversy for our decision.

The Teamsters agree that if the compensatory fine proceeding is permitted to continue, the issues presented on this appeal must be decided. They conclude, however, that we should order dismissed the contempt proceedings as well as these appeals. The Teamsters' argument is essentially this: in evaluating whether the controversy presented by this appeal from the original orders is moot, this court may not examine the posture of the pending contempt proceedings. We should, it is argued, decide whether this appeal is moot without reference to the possibility of damage liability in the contempt pro-

ceedings below, and if we determine the case is moot we should also instruct the district court to dismiss the contempt proceedings. We disagree with that reasoning.

The Teamsters contend we are governed by *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911). Procedurally *Gompers* does resemble this case. The company had secured an injunction against a boycott. Appeals were taken from this injunction. Before the appeal was decided, the company initiated contempt proceedings, and the defendants were adjudicated in contempt and sentenced to jail sentences. The original injunctive decree was upheld by the court of appeals, and some time later the contempt adjudication was also affirmed. By the time the appeals from the original injunction reached the Supreme Court, the parties had settled their differences. The Court accordingly dismissed the appeal as moot. *Buck's Stove & Range Co.* v. *American Federation of Labor*, 219 U.S. 581, 31 S.Ct. 472, 55 L.Ed. 345 (1911). Thereafter the Court also dismissed the appeal of the contempt adjudication as moot. It held:

> [W]hen the main cause was terminated by a settlement of all differences between the parties, the complainant did not require and was not entitled to any compensation or relief [in the contempt proceedings].

221 U.S. at 451-52, 31 S.Ct. at 503. *Gompers* has subsequently been refined, *see, e.g.*, *Backo* v. *Carpenters Local 281*, 438 F.2d 176, 182 (2d Cir. 1970), *cert. denied*, 404 U.S. 858, 92 S.Ct. 110, 30 L.Ed.2d 99 (1971), but we think the Teamsters' discussion of *Gompers* and its progeny ignores a crucial distinction between that case and the instant case.

In *Gompers*, the parties had entered into a settlement which completely resolved all matters involved in the litigation between them. 221 U.S. at 451, 31 S.Ct. at

502; 219 U.S. 581, 31 S.Ct. 472 (1911). The determinations of mootness were predicated on this finding. In our case, by contrast, there has been no out-of-court settlement by the parties of "every material controversy which the record present[s]." 219 U.S. at 581, 31 S.Ct. at 472. The strike has ended and the parties have signed a new collective bargaining agreement, but this does not constitute a settlement of the controversies which spawned this litigation. A recent third circuit case illustrates the point. In *Bituminous Coal Operators' Association Inc.* v. *U.M.W.*, 585 F.2d 586 (3d Cir. 1978), the employer had sued for both injunctive relief and damages. While the appeal from the district court's orders was pending, the collective bargaining agreement which was allegedly breached expired and a new agreement was signed. The Union argued that this development mooted the case; the court of appeals disagreed:

> We note at the outset that the expiration of the 1974 agreement and the execution of the 1978 agreement have not mooted a claim for damages by the mine owners.

Id. at 599.

The possibility of compensatory damage liability in this case arises from the civil contempt adjudication and not, as in *Coal Operators*, from a damages action under the NLRA. We perceive no constitutional distinction in this fact. *Cf. Latrobe Steel Co., supra*, 545 F.2d at 1345-46. A proceeding for civil contempt is part of the original action. *See, e.g., Gompers, supra*, 221 U.S. at 444-45, 31 S.Ct. at 499-500. For purposes of determining whether a live controversy exists on this appeal from the injunctive orders of the district court, we may consider the fact that the Union has been adjudicated in civil contempt of those orders, and that imposition of substantial compensatory damages depends on resolution of the issues presented on this appeal. *Cf. also American Bible Society*

v. *Blount*, 446 F.2d 588 (3d Cir. 1971); *Meyers* v. *Jay Street Connecting Railroad*, 288 F.2d 356 (2d Cir. 1961).[5]

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[5] Moreover, even were there no possibility of damages recovery in the further district court proceedings, this appeal probably would not be moot under the "capable of repetition, yet evading review" standard as elaborated in recent cases as *Weinstein* v. *Bradford*, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975), *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974), and *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979), *Amalgamated Transit Union* v. *Greyhound Lines, Inc.*, 550 F.2d 1237, 1238 n.1 (9th Cir.), *cert. denied*, 434 U.S. 837, 98 S.Ct. 127, 54 L.Ed.2d 99 (1977), and *Bituminous Coal Operators' Association, Inc.* v. *U. M. W.*, 585 F.2d 586, 599-600 (3d Cir. 1978). Under these cases, a challenged action is not moot when:

> (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there (is) a reasonable expectation that the same complaining party would be subjected to the same action again.

The first prong of this test is met, as this strike ended before its legality could be fully litigated. As the Court has noted, "[T]he great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender." *Super Tire Engineering* v. *McCorkle*, 416 U.S. 115, 126, 94 S.Ct. 1694, 1700, 40 L.Ed.2d 1 (1974).

There is also a reasonable expectation the same complaining parties will take similar action again. The September, 1977 strike was not the first strike of TIA by the Teamsters. In July of 1974, TIA's flight attendants and flight crewmembers, both represented by the Teamsters, struck TIA. Similarly, Saturn Airways, which merged into TIA, was the object of strikes by its pilots, represented by ALPA, in May of 1972. Saturn's flight engineers, attendants, and navigators, all represented by the Teamsters, struck Saturn again in August of 1974. Saturn secured a court order requiring the striking parties to return to work. Further, the actions of TIA in maintaining operations in the face of the strikes in this case were found by the district court to be common methods used by employers, and presumably reasonably likely to be used by TIA in the event of another strike. The Teamsters and ALPA continue to represent some of the groups of employees involved in this lawsuit. Thus the same parties whose conduct is at issue in this

The Teamsters raise another, more limited, mootness argument. They contend TIA's appeal from the district court's refusal to enjoin a strike against its commercial operations is moot. Noting that TIA's flight attendants (but not its engineers) now have a different bargaining representative (the Association of Flight Attendants), the Teamsters argue there can be no expectation that TIA will be subjected again to the Teamsters' alleged bad-faith bargaining tactics. We reject this argument. If the Teamsters did not make a reasonable effort to reach an agreement during major disputes bargaining, its strikes against both commercial and military flights could be enjoined. The Union's bargaining conduct was an alternative ground—in addition to the military no-strike clause—for the injunction underlying the contempt order. For this reason alone, even apart from our reluctance to fragment this appeal into "live" and "moot" issues, and the possibility that the dispute is not moot under the "capable of repetition yet evading review" standard, *see Weinstein* v. *Bradford*, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975); *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 187, 99 S.Ct. 983, 992, 59 L.Ed.2d 230 (1979); *Amalgamated Transit Union* v. *Greyhound Lines, Inc.*, 550 F.2d

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suit will continue to face each other across the bargaining table. Moreover, the new contract signed by TIA and the Teamsters on January 12, 1978, contains the same military no-strike clause which is the principal subject of this opinion. Finally, although the bargaining and subsequent strike giving rise to the instant dispute have been settled, the record before us on the issues presented for decision is no less concrete than it would be if the strike were ongoing.

Our reliance on the potential pending damage liability makes it unnecessary for us to consider whether TIA's failure to request declaratory relief in its original complaint would affect a decision regarding mootness, *see Coal Operators, supra*, 585 F.2d at 599-600; *Japan Air Lines Co.* v. *International Association of Machinists*, 538 F.2d 46, 50-51 (2d Cir. 1976).

1237, 1238 n.1 (9th Cir.), *cert. denied*, 434 U.S. 837, 98 S.Ct. 127, 54 L.Ed.2d 99 (1977), the Union's bargaining behavior is part of the live case or controversy before us. *See Coal Operators, supra*, 585 F.2d at 600.

Turning to the merits, we address first the clean hands issue. We affirm the district court's finding, on the motion for preliminary relief, that TIA was not prevented from seeking injunctive relief because of its own conduct. Without explicitly passing on the accuracy of the Teamster's characterization, the district court concluded:

> TIA's varied and extensive efforts to continue its operations during the current strike in an attempt to defeat the strike . . . are all legally permissible and fairly common methods of countering the impact of a strike . . . These parties are engaged in a hard fought labor dispute that unfortunately has resulted in a test of their relative economic strength. In such a situation, it is not unusual or unfair for both sides to resort to all of the weapons legally available to them.

The activities of which the union complains are not discussed in detail in the district court's opinion of October 26, 1977,[6] but the parties have presented their views of

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[6] The opinion of the district court was as follows:

MEMORANDUM AND ORDER RE PILOTS

The facts of this labor dispute have already been fully set forth in this court's memoranda of September 26 and September 28, 1977. Plaintiff TIA now moves for a preliminary injunction against defendant ALPA regarding TIA's military flights. The matter has been fully heard by the court and has been submitted for decision on the record and pleadings on file.

The court has heard a substantial amount of testimony regarding TIA's varied and extensive efforts to continue its operations during the current strike in an attempt to defeat the strike. Nevertheless, the court does not feel that TIA's actions, which are all legally permissible and fairly common methods

TIA's conduct in their briefs. Having reviewed their contentions, we cannot conclude that the district court applied a legally improper standard or made clearly erroneous findings of fact. On the motion for preliminary relief it was not improper to conclude that the practices complained of were not sufficiently likely to be found illegal or otherwise wrongful that TIA should be pre-

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of countering the impact of a strike, are so inequitable as to require the denial of injunctive relief. These parties are engaged in a hard fought labor dispute that unfortunately has resulted in a test of their relative economic strength. In such a situation, it is not unusual or unfair for both sides to resort to all of the weapons legally available to them.

The court would also like to make note of an additional matter which has come to its attention during these proceedings. The testimony of Mr. Arthur Perkel of the Military Airlift Command (MAC) makes it clear that, without specifically intending to do so, the administration of MAC expansion business will almost inevitably tend to strengthen the economic position of a struck airline, such as TIA, as against its striking employees. The number of airplanes freed by a strike against the airline's commercial flights allows the airline to seek and obtain a greater proportion of the available MAC expansion business. Furthermore, this effect can be greatly magnified if the cooperation of other airlines with MAC contracts can be obtained, as may have been the situation in this case. Although this effect troubles the court in granting this injunction, we do not feel that this matter is one for judicial resolution. Rather, such matters should be taken up with the proper parties within the executive branch, such as the Secretary of Defense and the Secretary of the Air Force.

Therefore, it is hereby ORDERED that plaintiff's motion for a preliminary injunction with regard to military flights is granted, for the reasons stated herein and in the court's memorandum and order of September 28, 1977. The terms of this preliminary injunction are to be the same as the temporary restraining order of September 28, 1977.

Counsel for the plaintiff shall prepare a proposed form of judgment. Rule 58, Fed.R.Civ.Pro.

vented from seeking injunctive relief. *See Illinois Central R. R.* v. *Brotherhood of R. R. Trainmen*, 398 F.2d 973 (7th Cir. 1968); *Brotherhood of R. R. Trainmen* v. *Akron & B. B. R. R. Co.*, 128 U.S.App.D.C. 59, 92, 385 F.2d 581, 614 (D.C. Cir. 1968), *cert. denied*, 390 U.S. 923, 88 S.Ct. 851, 852, 19 L.Ed.2d 983 (1968); *Long Island R. R. Co.* v. *System Federation No. 156*, 368 F.2d 50 (2d Cir. 1966).

Similarly, we affirm the district court's finding that the Teamsters did not violate the obligations imposed by section 152 First in the course of their bargaining with TIA. The facts allegedly demonstrating the Teamsters' lack of reasonable effort to make an agreement have already been described. The district court, in finding no violation, noted that the increase in the number of Teamster bargaining proposals, from 61 in early 1976 to over 200 in March of 1977, was a reasonable response to the merger between TIA and Saturn:

> The testimony heard by the court on this matter indicates that what the Teamsters were trying to do with the introduction of their March, 1977, proposal was to integrate the old Saturn and old TIA agreements, taking the best from both. Since the carriers were newly merged and the Teamsters were now representing a larger group of flight attendants, it hardly seems unreasonable for them to modify their previous proposal substantially to meet the new conditions.

The court found, "negotiations did not get under way [] in earnest until approximately the time the Teamsters introduced their new proposal," and concluded that the increased number of proposals was reasonable in light of the recent merger between TIA and Saturn. The district court's finding is not clearly erroneous and must be affirmed. Similarly, its finding that the assertedly exorbitant size of the Teamsters' proposals regarding

wages, benefits, and working conditions did not demonstrate a refusal to make reasonable efforts to reach an agreement must, on this record, also be affirmed. The court held: "The court can find no previous decision under the RLA, nor can TIA suggest one, which has inferred lack of reasonable effort solely from the size of the proposals put forth by the parties." The court noted that the union had reduced its proposals on two occasions, and characterized the bargaining as "obstinate and unyielding" but not in violation of the statutory standards.

We do not hold that a union's insistence on proposals of the kind involved here could never be the basis for a finding that a union did not comply with its obligations under section 152 First; but in this case the district court's finding is not clearly erroneous. *Cf. REA Express, Inc.* v. *Brotherhood of Railway Clerks*, 358 F.Supp. 760, 772, n.43 (S.D.N.Y. 1971) and cases cited therein. *Cf. also Atlantic Coast Line R. R. Co.* v. *Brotherhood of Railway Trainmen*, 262 F.Supp. 177, 183-85 (D.D.C. 1967).

We are confronted, then, with TIA's argument that injunctive relief against the primary strike was appropriate because of language contained in the collective bargaining agreement. The Teamsters argue that the district court lacked jurisdiction to issue the injunction by reason of section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, maintaining that once the major dispute mechanisms of the RLA had been exhausted, the unions could not be enjoined from using their full economic power in support of their demands. We agree.

The accommodation reached between the Norris-LaGuardia Act and the National Labor Relations Act does not necessarily carry over to disputes controlled by the RLA. In this regard, the Supreme Court has stated: "The relationship of labor and management in the railroad industry has developed on a pattern different from

other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the bases of the [NLRA] . . .." *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R. R.*, 353 U.S. 30, 31-32 n.2, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957). On the other hand, in cases which present difficult questions under the RLA but do not require statutory interpretations that are unique to the mechanisms of that Act, the doctrines developed by Congress and the courts from their experience in adjusting questions of labor law policy generally are instructive. For an analogy, and to determine national labor policy, it is appropriate to refer to the NLRA for assistance in construing the RLA. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383-84, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969).

The principal question with respect to the primary strike is whether the contract provision by which the union agreed not to strike military flights, even after RLA dispute mechanisms had been exhausted, is enforceable by injunctive relief. Decision of this question requires an analysis of the dispute resolution mechanisms of the RLA. The RLA provides that "minor disputes" are to be resolved by binding arbitration. A second set of procedures is designed to facilitate a voluntary agreement of the parties in major disputes. *See Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945); *O'Donnell* v. *Wien Air Alaska, Inc.*, 551 F.2d 1141 (9th Cir. 1977). The minor disputes provisions

> contemplate[] the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case.

Elgin, supra, 325 U.S. at 723, 65 S.Ct. at 1290. The major disputes provisions relate to disputes over the formation of collective agreements or efforts to secure them. The Act's procedures for major disputes have been described as follows:

> A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place however, only if both consent. § 5 First, 7. If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President," who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo.* § 2 Seventh, 5 First, 6, 10.

Brotherhood of Railroad Trainmen v. *Jacksonville Terminal Co., supra,* 394 U.S. at 378, 89 S.Ct. at 1115.

In general, when a contract provision is opened to negotiation, the provision is not kept in effect by operation of the RLA once the procedures for major dispute resolution are exhausted. To encourage voluntary settlement of major disputes, the RLA postpones the time for self-help remedies. However, if after reasonable efforts the parties have exhausted the bargaining procedures specified by the RLA without agreement, the statute does not bar such remedies, including a strike.

> For [the] settlement [of major disputes] the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. § 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help.

Elgin, supra, 325 U.S. at 725, 65 S.Ct. at 1291. *See also Jacksonville Terminal Co., supra,* 394 U.S. at 379-80, 89 S.Ct. at 1115-16. All concede that the primary strike by the flight attendants did not commence until the major dispute resolution procedures of the Act had been exhausted.

We think there can be no question about the meaning of the military no-strike clause in this case. We agree with the conclusions of the district court in this regard. As Judge Peckham stated:

> The clear import of this provision is to extend the no-strike obligation of the flight attendants beyond the term of the collective-bargaining agreement, even beyond the expiration of the 30-day cooling-off period mandated by the RLA, when the Teamsters would otherwise have the right to strike against all of TIA's operations. The Teamsters do not dispute the meaning of this provision . . . . This military no-strike clause could not be clearer in expressing its intent that the flight attendants thereby give up their right to strike TIA's military flights even during those periods when they might strike all of TIA's other operations.

A contrary interpretation would render material portions of the clause meaningless. TIA would not secure

the union's promise not to strike military flights after exhaustion of RLA procedures if it were intended that operation of the procedures nullified the obligation. The flight attendants' strike, therefore, violated the military no-strike clause, and resort to minor dispute arbitration is not necessary to reach this conclusion. *See Wien, supra* at 1146-47; *Seaboard World Airlines, Inc.* v. *Transport Workers Union*, 425 F.2d 1086, 1090 (2d Cir. 1970).

Similarly, we think the Teamsters' strike in violation of their contract obligation did not present a major dispute. In the normal case, once having exhausted major disputes procedures the parties are free to resort to self-help. The military no-strike clause had already been the subject of bargaining in the major disputes sessions. We hold, *infra*, that, as the parties intended, the clause was binding even after exhaustion of those procedures, but TIA advances no theory by which this fact makes the strike enjoinable as involving a major dispute.

We find no authority by which the contract clause in question can be held to violate RLA policies. Once major dispute procedures are completed and the different pressures put on the parties to achieve voluntary settlements have been exhausted, it is true that ordinarily the employer and the union are free to resort to the traditional economic weapons. *Brotherhood of Locomotive Engineers* v. *Baltimore & O. R.R.*, 372 U.S. 284, 291, 83 S.Ct. 691, 695, 9 L.Ed.2d 759 (1963) (per curiam); *Elgin, supra*. The RLA does not, however, preclude the parties from adopting a different procedure by contract. *Cf. Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 279-84, 76 S.Ct. 349, 356-59, 100 L.Ed. 309 (1956).[7]

Whatever may be that limitation on the extent of damages properly awarded in an action at law, see note

[7] For instance, nothing in our holding today prevents parties from agreeing to binding arbitration after the major dispute mechanisms of the Act are exhausted.

9 *infra*, a question we do not reach here, we perceive no policies peculiar to the RLA which prohibit the parties from regulating by contract their post-major disputes relations in the manner they have here. It is true that ordinarily a union's promise not to strike is accompanied by a promise that the employer agrees to submit the dispute to binding arbitration. The parties have not directed our attention, however, to cases requiring an arbitration clause as to condition to holding the no-strike promise binding.

A determination that the military no-strike clause is valid and not contrary to RLA policies does not control the ultimate question whether the contract clause may be enforced by injunctive relief. The anti-injunction command of the Norris-LaGuardia Act may operate independently to bar an injunction notwithstanding the validity of the contract clause to be enforced, and we rule the injunctive power of the federal court may not be used to enforce the no-strike clause here.

If this case arose under the NLRA, an injunction would not be granted. *See Buffalo Forge Co.* v. *United Steelworkers*, 428 U.S. 397, 404-12, 96 S.Ct. 3141, 3146-50, 49 L.Ed.2d 1022 (1976) (majority); *id.* at 424 n.15, 426 n.20, 96 S.Ct. at 3155 n.15, 3156 n.20 (dissent); *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970). As the Court in *Buffalo Forge* stated:

> "[T]here is no general federal anti-strike policy; and although a suit may be brought under § 301 against strikes which, while they are breaches of private contracts, do not threaten any additional public policy, in such cases the anti-injunction policy of Norris-LaGuardia should prevail."

428 U.S. at 409, 96 S.Ct. at 3148, *quoting Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 225, 82 S.Ct. 1328,

1344, 8 L.Ed.2d 440 (1962) (dissent). If we were persuaded that a substantial purpose unique to the RLA, or protection of its dispute settlement mechanisms, would be substantially furthered by specific enforcement of the clause, we would sustain the order for injunctive relief, but no such conditions exist here.

We do acknowledge that there are some considerations which make an injunction appear appropriate in this case, although for reasons stated below we do not find them dispositive. Enforcement of a no-strike clause may have a salutary effect on labor relations, since the employer presumably will consent to a contract for a shorter term in return for a no-strike clause enforceable by an injunction, which reduces the risks inherent in renegotiating the contract. Frequent negotiation, under this view, furthers industrial stability by permitting more precise adjustments to meet changing economic conditions.

Further, the breach of contract in this case is plain and unambiguous. One might argue that unambiguous contract breaches could be enjoined without doing violence to any Norris-LaGuardia Act policy. *See* Note, *The Applicability of Boys Markets to Refusals to Cross a Picket Line*, 76 Colum.L.Rev. 113, 136-41 (1976). *Cf. Buffalo Forge, supra*, 428 U.S. at 416-17, 96 S.Ct. at 3151-52 (dissent) (purpose of Norris-LaGuardia Act is to protect labor organizing and ability to bargain collectively, not to prohibit enforcement of collective bargaining agreements); F. Frankfurter & N. Greene, The Labor Injunction 5-46 (1930); Smith, *The Supreme Court, Boys Markets Labor Injunctions, and Sympathy Work Stoppages*, 44 U.Chi.L.Rev. 321, 341 (1977).

Moreover, in this case the military no-strike clause was directed to the discrete transportation function of military flights, the union retaining the right to strike other TIA flights. In addition, apparently the federal government insisted that the company insert the clause

as a condition of obtaining military contracts. The no-strike clause therefore furthered specific government transportation interests.[8]

Finally, the RLA contains a statutory provision requiring the parties to a contract to maintain their agreement without breach. 45 U.S.C. § 152 First provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

The Supreme Court in *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570, 91 S.Ct. 1731, 29 L.Ed.2d 187 (1971) held that this section imposed a substantive duty on parties, enforceable by injunctive relief, to exert reasonable efforts during the negotiating process to reach an agreement. More to the point, the duty to maintain agreements was found a basis for injunctive relief in *Seaboard World Airlines, Inc.* v. *Transport Workers Union*, 425 F.2d 1086 (2d Cir. 1970), *reaff'd in further consideration*, 443 F.2d 437 (2d Cir. 1971), and *Southern Pacific Transportation Co.* v. *Railway & Steamship Clerks*, 81 L.C. para. 13,113 (N.D. Cal. 1975). The Second Circuit in *Seaboard* permitted an injunction to prohibit a strike in violation of the union's

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[8] The Government's transportation interests are protected to some extent by 45 U.S.C. § 160. The Mediation Board may notify the President of disputes which threaten serious disruption, and the President may then create a board to investigate and report respecting the dispute. For the thirty days allowed for the board's work, and for thirty days thereafter, no change in the status quo is permitted except by agreement of the parties.

contractual promise not to reopen certain subjects for RLA major disputes bargaining before a given date.[9]

The difficulty in relying on the above considerations to justify injunctive relief is that, with the exception of the language in section 152, all of these factors if present in a case arising under the NLRA would be insufficient to permit an injunction to issue.

The result contended for by TIA and Judge Wallace in his thoughtful opinion would mean that a federal court has radically different powers to enjoin a strike which clearly violates language in the collective bargaining agreement, depending on whether the controlling statute is the NLRA or the RLA. Admitting the different genesis of the RLA, *see Chicago River, supra* at 31-32 n.2, we do not think the statutory policies are sufficiently distinct to justify such different application of the Norris-LaGuardia Act's anti-injunction mandate. Absent a substantial nexus with statutory dispute settlement mechanisms or an agreement to arbitrate, an injunction may not issue to prevent a plain breach of a no-strike clause by a union. The language of section 152 is perhaps unique to the RLA. The history of the RLA,

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[9] In *Seaboard* the parties, by supplemental agreement, had resolved an issue of job security for flight navigators displaced by technological change and it was agreed not to reopen the issue for a period of ten years. The rest of the bargaining agreement came due for reopening at an earlier date. At that date, the union served a section 6 notice which included a request to negotiate the flight navigator question, the very issue put out of reach by the supplemental agreement. When the airline refused to negotiate the issue, the union struck, arguing that the carrier was avoiding its obligations to bargain under the major disputes provision of the Act. The court held that an anti-strike injunction could issue pending resolution by the district court of the question whether the extended prohibition on reopening the particular subject was illegal, and it later affirmed both the district court's conclusion that the clause was legal and its grant of an injunction against similar strikes in the future.

nevertheless, prevents us from finding in the Act's obligation to "maintain agreements" a broad mandate to enjoin all, or even plain, breaches of collective bargaining agreements by a union. Without question, the RLA was a response to the perceived dangers of disruption in the transportation industry. This history has been described elsewhere and need not be repeated here. *See Chicago & N.W. Ry., supra*, 402 U.S. at 574-84, 91 S.Ct. at 1733-39; *Chicago River, supra*, 353 U.S. at 40, 77 S.Ct. at 640; *Elgin, supra*, 325 U.S. at 724-27, 65 S.Ct. at 1290-92; *Wien, supra* at 1145-46. The important point is that Congress responded to these concerns by implementing a comprehensive system of binding arbitration and mandatory nonbinding mediation involving drawn-out procedures designed to encourage parties to reach agreement. The policy of the statute is not that any act which disrupts the transportation industry may be enjoined. Instead, after major dispute procedures are completely exhausted, with reasonable efforts having been made to reach an agreement, *see Chicago & N.W. Ry., supra*, the policies peculiar to the RLA are also exhausted, and the parties are governed by general labor law principles. The Norris-LaGuardia Act was passed to limit our role in enforcing labor contracts, in part because of mistakes of the past and in part, perhaps, for fear that personal bias sometimes difficult to detect even in ourselves will weigh too heavily in the enforcement process. *See, e.g., Chicago River, supra*, 353 U.S. at 40-41, 77 S.Ct. at 640-641; F. Frankfurter & N. Greene, *supra*. Congress has mandated the courts not to alter through injunctions the economic balance between employers and unions without a weighty statutory reason for doing so.[10] The RLA plan

[10] For example, if we were to enforce the military no-strike clause by an injunction, it might be appropriate to limit its duration to a reasonable time, rather than indefinitely. To define a reasonable time for enforcement probably would require a decision as to when hardship on the union becomes so great that the injunction should

for avoiding disruption is not threatened by the flight attendants' strike, and a proper accommodation between the Norris-LaGuardia Act and the NLRA, as determined by the Supreme Court, prohibits enjoining the Teamsters' strike; therefore, the strike in this case may not be enjoined. *See generally Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co., supra,* 394 U.S. at 374-93, 89 S.Ct. at 1113-24 ("[P]arties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute [may] employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law." *Id.* at 392, 89 S.Ct. at 1123).

Seaboard does not require a different result. There the court held that a section 6 notice does not open all possible subjects for bargaining between the parties if they have contracted otherwise, and that the parties may agree beforehand not to reopen certain issues when the rest of the collective bargaining agreement comes up for renegotiation pursuant to section 6. Its reasoning does not support TIA's view of section 152. *Seaboard* involved the effect of contractual efforts to limit the scope of a section 6 proceeding, instead of efforts to specify permissible post-mediation measures. Also, unlike the case before us, the injunction in *Seaboard* enabled the parties to complete required bargaining on all other issues subject to a section 6 notice, and thus pursue dispute settlement procedures not yet exhausted.

Chicago & N.W. Ry. similarly does not support enjoining a primary strike for the purpose of enforcing a

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be lifted so the union can begin punishing the employer for refusal to accede. Whatever might be our powers to make such judgments in damage actions for breach of contract, the Norris-LaGuardia Act was designed to preclude courts from issuing injunctions on this kind of determination.

clause in the collective bargaining agreement. The rationale for the injunction in that case was that the union had failed to use reasonable efforts to comply with the mandatory disputes settlement mechanisms that lie at the heart of the act. The integrity of these mechanisms was thus protected by the injunction in *Chicago & N.W. Ry.*; enjoining the Teamsters' primary strike in this case would not similarly further the RLA's arbitration policies. We do not think *Chicago & N.W. Ry.* is authority for abandoning the Norris-LaGuardia Act's anti-injunction provisions whenever a union subject to the RLA has plainly violated its collective bargaining agreement.

It might appear anomalous that if a no-strike clause in force during the life of the contract was ambiguous as to whether the strike was permitted, the strike could be enjoined pending the outcome of minor dispute arbitration, and an arbitrator's determination that the strike should stop could be enforced in federal court by an injunction, *see Order of Ry. Conductors & Brakemen* v. *Spokane P. & S. R.R.*, 366 F.2d 99, 102 (9th Cir. 1966), *cert. denied*, 385 U.S. 1025, 87 S.Ct. 752, 17 L.Ed. 2d 673 (1967) (RLA); *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) (NLRA), but that where the breach is so clear that arbitration is not necessary to determine the violation, no injunction may issue. This result, however, is compelled by the combination of the manner in which Congress and the RLA chose to reduce disruption in the transportation industry, and the controlling interpretations of the Norris-LaGuardia Act.

The second principal issue on this appeal is the authority of the district court to enjoin any aspect of the sympathy strike. The district court held that it could enjoin only the sympathy strike directed against military flights. *Trans International Airlines, Inc.* v. *International*

Brotherhood of Teamsters, 439 F.Supp. 184 (N.D.Cal. 1977). We think the district court had jurisdiction to enjoin the sympathy strike in its entirety.

Differences among the contracts of the premerger TIA flight engineers and pilots, the former Saturn flight engineers, and the former Saturn pilots, bear on the issues addressed below, and we set forth relevant portions of the contracts in the margin.[11] The controlling collective

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[11] As a result of the merger in 1976 of TIA and Saturn Airways, at the time of the events in question former Saturn engineers and pilots were governed by a different contract than the premerger TIA engineers and pilots. As we discuss further below, see pages ——-——, slip op. pages 2059-2060, differences in contract language between the former Saturn flight engineers and the premerger TIA flight engineers and pilots would bear on the propriety of granting preliminary relief. In relevant part, the contracts provide:

PRE-MERGER TIA FLIGHT ENGINEERS AND PILOTS
(Agreement of July 21, 1974)

"SECTION 21

A. [General No Strike Clause] During the term of this Agreement, the Union shall not authorize, cause, sanction or engage in any strike, picketing, slowdown or stoppage of work.

. . . .

D. [Military No Strike Clause] The Union further agrees that the Crewmembers will continue to perform all duties which are necessary to enable the Company to operate flights for or in support of traffic sponsored by the Department of Defense of the United States of America, even though such Crewmembers withdraw from commercial airline service because of a dispute arising out of negotiations for a new contract after the expiration date of this Agreement and/or during and after all procedures of the Railway Labor Act have been exhausted, . . .

E. [Picket Line Clause] It shall not be a violation of this Agreement, and it shall not be a cause for discharge or disciplinary action in the event a Crewmember refuses to go through or work behind a legal primary picket line maintained by the Union in connection with a dispute between the

bargaining agreements between the carrier and the flight engineers and pilots, both with premerger TIA employees

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Company and the Union involving any flight personnel represented by the Union."

FORMER SATURN FLIGHT ENGINEERS

(Agreement of November 17, 1974)

"Section 24

. . . .

L. [General No Strike Clause] The Company will not lock out any employees covered by this Agreement and the Union and its members, individually and collectively, agree that they will not authorize or take part in any strike or picketing at the Company's premises during the life of this Agreement, until the procedures for settling disputes involving employees covered by this Agreement, as provided for by the Railway Labor Act, have been exhausted by both parties.

. . . .

P. [Military No Strike Clause] Conduct of Military Operations—It is mutually agreed that during the term of the Agreement between the Company and its Flight Engineers as represented by the Union, that the Flight Engineers will not engage in any strike or work stoppage on purely military operations conducted by the Company."

FORMER SATURN PILOTS

(Agreement of May 23, 1972)

This contract contains no general no-strike agreement as such, although it does, in Section 26 C 12, reserve to each party all the rights and privileges accorded under the provisions of the Railway Labor Act.

"Section 29

. . . .

K. [Military No Strike Clause] In the interest of national defense and in the event of the withdrawal from service from Saturn Airways, Inc., of crew members covered by this agreement, essential military services shall be permitted to operate; provided, however, that this policy shall only pertain to those flights that are solely and completely military in nature and whose entire cargo is comprised of military commodities or military personnel."

and former Saturn employees, contained a no-strike clause and a military no-strike clause, and the question whether the sympathy strike was in violation of the contracts presents a minor dispute under the Act. Both TIA and the Teamsters agree that the dispute must be resolved through the Act's binding arbitration procedures for minor disputes. We cannot say that either TIA's or the Teamsters' interpretation of the contracts are completely without merit. Interpretation of the collective bargaining agreements with respect to the sympathy strike is therefore in the first instance a matter for the adjustment board rather than a court. The question presented for our decision is whether the flight engineers and pilots are required to resort to the minor dispute mechanisms of the Act to have their rights clarified before engaging in the sympathy strike.

The court in *Chicago River*, *supra*, permitted injunctions to be issued, the Norris-LaGuardia Act notwithstanding, when the strike threatened the jurisdiction of the minor dispute arbitrator. Subsequent to *Chicago River*, the Court also permitted strikes to be enjoined to protect binding arbitration provisions in a collective bargaining agreement arising under the NLRA. *Boys Markets* v. *Retail Clerks*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970) (reversing *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 82 S.Ct. 1328, 8 L.Ed.2d 440 (1962)). *Buffalo Forge Co.* v. *United Steelworkers*, 428 U.S. 397, 96 S.Ct. 3141, 49 L.Ed.2d 1022 (1976) then clarified the *Boys Markets* case, holding that in NLRA cases the Norris-LaGuardia Act deprived federal courts of jurisdiction to enjoin a sympathy strike, even where the strike is clearly forbidden by a contractual no-strike clause and the parties have agreed to binding arbitration. The Court concluded that the sympathy strike was not "over an arbitrable grievance."

Chicago River, arising under the RLA, and *Boys Markets*, arising under the NLRA, reached parallel results; indeed the later case made specific reference to the principles elaborated in *Chicago River*. The close relation of those cases does not mean, however, that the injunctive power of the federal courts is coextensive under the two statutes. *See Sinclair Refining*, *supra*, 370 U.S. at 210-11, 82 S.Ct. at 1336-37. We conclude that not all of the reasoning of *Buffalo Forge* applies in RLA cases and that policies unique to RLA support jurisdiction to enjoin the sympathy strike in this case.

A principal goal of the Court in *Buffalo Forge* was to avoid judicial intrusion on an arbitration form established by contract. The Court pointed to the dangers of judicial declarations that might control an arbitrator's determination of the case, a responsibility assigned exclusively to him by agreement of the parties. *See* 428 U.S. at 410-12, 96 S.Ct. at 3148-50. The Court refused to conclude, in the absence of express language in the contract, that the parties intended to allow preliminary injunctive relief pending arbitration, where such relief was not necessary to insure arbitration of the dispute. *See id.* at 411, 96 S.Ct. at 3149. Perhaps the Court was also worried that a contrary result would lead to fewer abitration clauses in collective bargaining agreements, the unions being less willing to agree to arbitrate disputes or to proceed to arbitration following a preliminary injunction. *See id.* at 412, 96 S.Ct. at 3149. These considerations are inapplicable here. Congress in the RLA established a process of minor dispute settlement without reference to any arbitration framework which would have been agreed upon by the parties. The permissible prearbitration remedies agreed upon by the parties, and the effect of our decision on the number of minor disputes likely to be settled by arbitration, are not issues presented by this case.

Moreover, implementation of the RLA's process for resolving minor disputes is not limited to granting preliminary injunctive relief only where the relief will make it more likely that the dispute will be arbitrated.[12] The requirement of arbitration under the RLA is an essential part of the congressional purpose of avoiding interruption of the transportation industry. *Chicago River, supra,* 353 U.S. at 40, 77 S.Ct. at 640; *Elgin, supra,* 325 U.S. at 724-727, 65 S.Ct. at 1290-1292; *Wien, supra* at 1145-46. The minor dispute arbitration procedure was designed as a substitute for prearbitration strikes, *cf. Chicago River, supra,* and we think this includes sympathy strikes of the character presented in this case. *See Detroit and T. Shoreline R.R.* v. *United Transportation Union,* 396 U.S. 142, 148, 90 S.Ct. 294, 298, 24 L.Ed.2d 325 (1969); *Texas and N.O.R.R.* v. *Brotherhood of Railway & Steamship Clerks,* 281 U.S. 548, 565, 50 S.Ct. 427, 432, 74 L.Ed. 1034 (1930). The legislative history of the RLA suggests an intent to prevent a dispute that involves a small number of transportation workers from

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[12] The *Buffalo Forge* result has been explained by some commentators as resting on the insight that enjoining a sympathy strike does not make it more likely that the arbitrable dispute—the contractual right to engage in a sympathy strike—will be decided by the arbitrator. *See, e.g.,* 63 Cornell L.Rev. 507, 512 n.29 (1978); *Note, The Applicability of Boys Markets to Refusals to Cross a Picket Line,* 76 Colum.L.Rev. 113, 131 (1976). As stated in the text, to apply this rationale here would be to adopt a somewhat crabbed view of the purpose of the RLA minor dispute procedures. The Court noted that "Injunctions against strikes, even temporary injunctions, very often permanently settle the issue," 428 U.S. at 412, 96 S.Ct. at 3150. Not enjoining a sympathy strike may also, however, settle an issue for all practical purposes. Thus, in some cases, if any meaningful relief is to be available, limited prearbitration judicial intervention will be necessary where the employer can show a strong likelihood of ultimately prevailing in its interpretation of the clause and the inadequacy of other remedies. In the RLA context we must take the risk of making this determination in order to make the statutory mechanism work.

disrupting the carrier's existing operations and its relations with other employees. It would be contrary to this objective to permit a sympathy strike before completion of the minor dispute mechanisms for determining the legitimacy of the strike. We therefore reject ALPA's argument that *Boys Markets* and other related cases declare the policies underlying the use of arbitration to be identical under the NLRA and the RLA.

The policy of avoiding disruption of transportation businesses is not, of course, all encompassing. As we held above, a federal court under the RLA may not enjoin a strike plainly in breach of contract where the major disputes mechanism of the Act have been used and exhausted. The policy is strong enough, however, to require that where a minor dispute exists the union must first establish its contractual right to engage in a sympathy strike before disrupting a carrier's operation, at least where traditional standards governing preliminary relief are met.[13] This does no more than preserve the status quo pending clarification of the parties' rights by statutory procedures. Maintenance of the status quo before and during major dispute procedures is required by the RLA. *See Detroit and T. Shoreline R.R., supra*; 45 U.S.C.

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[13] We emphasize that where, as is true in this case, the employer's likelihood of ultimately prevailing depends in large measure on construction of the parties' bargaining agreement, the district judge should be satisfied that the sympathy strike clearly violates the no-strike clause or a controlling provision of the RLA.

In light of our disposition, it is unnecessary for us to consider in detail TIA's argument that regardless of any contract provisions, all sympathy strikes may be enjoined as violating policies expressed in the RLA. *See* Chicago & Illinois Midland Ry. v. Brotherhood of Railroad Trainmen, 315 F.2d 771 (7th Cir.), *vacated as moot*, 375 U.S. 18 (1963). *Compare* Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. R., 362 F.2d 649 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1966); Brotherhood of Locomotive Firemen and Enginemen v. Florida East Coast Ry., 346 F.2d 673 (5th Cir. 1965).

§ 156. Similarly where changes in the status quo are likely to lead to serious harm and threaten to disrupt the operation of the transportation carrier, injunctive relief is proper pending operation of the Act's minor dispute procedures. Maintenance of the status quo is, of course, a traditional basis for equitable relief. *See, e.g., Brotherhood of Locomotive Engineers* v. *Missouri-K.-T.R.R.*, 363 U.S. 528, 532-35, 80 S.Ct. 1326, 1329-1330, 4 L.Ed.2d 1379 (1960); *Tanner Motor Livery, Ltd.* v. *Avis, Inc.*, 316 F.2d 804, 808-9 (9th Cir.), *cert. denied*, 375 U.S. 821, 84 S.Ct. 59, 11 L.Ed.2d 55 (1963). Given the special concern of the RLA over continuous operation by carriers, it is appropriate to require the union to accept the status quo pending the arbitrator's decision. *See Smith, supra* at 340-49. *International Association of Machinists* v. *Street*, 367 U.S. 740, 771, 81 S.Ct. 1784, 1801, 6 L.Ed.2d 1141.

The preservation of the status quo is especially proper where failure to grant injunctive relief would make the arbitrator's ultimate decision a meaningless one. This was a consideration in *Missouri-K.-T.R.R., supra.* Upholding the action of the district court, which issued an injunction against a strike pending resolution of the minor dispute by the settlement mechanisms of the Act, the Court stated:

> From the point of view of these employees, the critical point in the dispute may be when the change is made, for, by the time of the frequently long-delayed Board decision, it might well be impossible to make them whole in any realistic sense. If this be so, the action of the district Judge, rather than defeating the Board's jurisdiction, would operate to preserve that jurisdiction by preventing injury so irreparable that a decision of the Board in the union's favor would be but an empty victory.

363 U.S. at 534, 80 S.Ct. at 1330.

For these reasons we conclude that the district court had jurisdiction to enjoin the sympathy strike, in its entirety, pending determination of the contractual rights of the parties by the adjustment board.

Although the district court had jurisdiction to enjoin the sympathy strike in its entirety, in light of the principles discussed in our opinion, relevant differences in the contract provisions of different groups of TIA employees may not have been considered as they should have been by the district court. In addition to the general and military no-strike clauses, the contract of the premerger TIA flight engineers and pilots contains a "picket line" clause which seems to permit the honoring of other employees' legal picket lines. Although the clause probably does not apply to the sympathy strike in this case,[14] the language would be a factor to consider in weighing the likelihood of the employer ultimately succeeding in its claim.[15]

SUMMARY

As to the primary strike, the order enjoining the strike of military flights is reversed and the order declining to enjoin the strike of nonmilitary strikes is affirmed.

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[14] *See* note 9, *supra*. We doubt, however, that the primary strike in this case was "legal" as the word was used in subsection E of the agreement. Further, TIA argues the clause applies only to individual, not concerted, refusals to cross legal picket lines.

[15] We recognize the theoretical possibility that the combination of our holdings regarding enjoinability of the primary and sympathy strike might lead employers to take curious actions. An employer seeking an injunction against a strike might attempt to argue that a clause which unambiguously prohibited the strike in question—so that there was no minor dispute to be arbitrated—was in fact unclear, so that minor dispute arbitration was necessary to determine its meaning and an injunction was appropriate pending such arbitration. We doubt that such behavior will be common, and we trust that the district courts are capable of disposing of any efforts to generate spurious minor disputes.

As to the sympathy strike, the trial court's ruling that it had jurisdiction to enjoin the strike of military flights is affirmed. If the strike were still in force we would remand this aspect of the case to the trial court for further consideration of the propriety of the injunction in view of our discussion of *Buffalo Forge*, the RLA, and the standards for granting injunctive relief in this situation. The strike having ended, however, such further proceedings are not required. The order of the district court declining to enjoin the sympathy strike of non-military flights on the ground of lack of jurisdiction is reversed.

Because of the contempt proceedings pending in the district court, a remand is appropriate. The pre-merger TIA engineers were represented by the Teamsters, and the agreement quoted in footnote 11 was in force when the district court issued its injunctions and contempt orders in this case. The trial court will consider the question of the legal rights of the parties for the alleged contempt in light of the principles set forth herein, together with such other considerations as it may deem appropriate to a just determination of the case.

The orders of the district court are AFFIRMED in part, REVERSED in part, and the case REMANDED for further proceedings.

The parties shall bear their own costs for the appeals taken to this court.

WALLACE, Circuit Judge, dissenting in part:

I dissent from that part of the majority's decision which reverses the district court's injunction order against the primary strike activity directed at military flights. Although I am mindful of the post-impasse setting of this labor dispute and the general policies favoring the free play of economic forces when parties fail to reach agreement, I believe that this is one of those oc-

casions when the general policies of the Norris-LaGuardia Act should give way to important countervailing policies embodied in the central provisions of the Railway Labor Act (RLA).

I

It has long been recognized "that Norris-LaGuardia does not invariably bar injunctive relief when necessary to achieve an important objective of some other statute in the pattern of labor laws." *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 217, 82 S.Ct. 1328, 1340, 8 L.Ed.2d 440 (1962) (Brennan, J., dissenting). Specifically, the Supreme Court has held on several occasions that the anti-injunction policy of Norris-LaGuardia will be overcome by the need to enforce a statutory duty arising under the RLA. *See, e.g., Chicago & N. W. Ry.* v. *United Transp. Union*, 402 U.S. 570, 91 S.Ct. 1731, 29 L.Ed.2d 187 (1971); *Brotherhood of R. R. Trainmen* v. *Howard*, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952); *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed.2d 22 (1949). The Court has stated that "the propriety of judicial enforcement [under the RLA] turns on the importance of the duty in the scheme of the Act, the capacity of courts to enforce it effectively, and the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory." *Chicago & N. W. Ry.* v. *United Transp. Union, supra*, 402 U.S. at 578, 91 S.Ct. at 1736. *See also International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 772-73, 81 S.Ct. 1784, 1801-02, 6 L.Ed.2d 1141 (1961).

There is no question that, in general, the RLA is designed to avoid interruption of commerce by channeling the parties through various procedures designed to enhance the chances for agreement. As the majority observes, normally the exhaustion of the major dispute processes of the RLA frees the parties to flex their

economic muscle. *See Brotherhood of R. R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 392, 89 S.Ct. 1109, 1123, 22 L.Ed.2d 344 (1969). For these reasons, an injunction in this setting must be justified by important considerations.

The majority acknowledges that the RLA does not preclude the parties from supplementing the statutory scheme by contract. Moreover, the majority has sustained the contract provision before us as consistent with the overall approach of the RLA. It is my view that the policies of the RLA are not exhausted when, as here, the parties have made clear provision for such a limitation on the weapons available in their own bargaining process. Nor am I persuaded that Trans International Airlines (TIA) should be denied its bargain on the sole ground that the dispute, though involving a contract term and to that extent being in the nature of a minor dispute, occurred in a post-mediation setting of an underlying major dispute. The pointed limitation included in the statement of the Supreme Court relied on by the majority is of great importance:

> parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute [may] employ the full range of whatever peaceful economic power they can muster, *so long as its use conflicts with no other obligation imposed by federal law.*

Brotherhood of R. R. Trainmen v. *Jacksonville Terminal Co.*, *supra*, 394 U.S. 369, 392, 89 S.Ct. 1109, 1123, 32 L.Ed.2d 344 (emphasis added). I have concluded that the use of such power in this case does conflict with an important obligation under the RLA.

It is my view that this case should be governed by the reasoning set forth in *Seaboard World Airlines* v. *Transport Workers Union*, 425 F.2d 1086 (2d Cir. 1970). In

Seaboard, the Second Circuit upheld an injunction of a strike called to pressure an employer into bargaining over topics not subject to reopening under the existing collective bargaining agreement. The court found that the union's attempt to breach the moratorium agreement amounted to a violation of its duty under section 2 First of the RLA "to exert every reasonable effort to make and *maintain agreements* concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier . . . ." (Emphasis added.) *See id.* at 1091. It is the violation of this same duty to maintain agreements which TIA invokes as the ground for the injunction in this case.

Although the majority does not find *Seaboard* to be dispositive, I believe that the problem presented there is analogous to the one we face. In each setting, the relevant contract provision was intended to block the union from pursuing its grievances by means of economic pressure on the employer—in *Seaboard*, by forbidding the giving of a section 6 notice that would set in gear the major dispute procedures of the RLA; in the case before us by forbidding strike pressure against military flights even after the exhaustion of those procedures.[1] In each case, the union's primary defense was that the contract term was somehow inconsistent with the overall purposes of the RLA and hence inapplicable; Norris-LaGuardia's restrictions on injunctive relief provided the union's fall-

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[1] The majority asserts that the injunction in *Seaboard* simply required the union to abide by its agreement to limit the scope of the section 6 proceeding, thereby enabling the parties to complete required bargaining on other subjects. The opinion in *Seaboard*, however, makes it clear that the moratorium agreement foreclosed bargaining on all subjects and that no section 6 proceeding was pending. *Seaboard World Airlines, Inc.* v. *Transport Workers Union*, 425 F.2d 1086, 1087-88 (2d Cir. 1970). Rather than clearing the path for relevant negotiations, the injunction in *Seaboard* foreclosed union efforts to compel any negotiations.

back position. In each setting, a strike injunction could have issued pending the RLA's mandatory arbitration procedures,[2] were it not for the fact that the minor dispute questioned the statutory validity of the contract provision rather than its intended meaning. *See id.* at 1090 (citing *Felter* v. *Southern Pacific Co.*, 359 U.S. 326, 327-28, 79 S.Ct. 847, 850-51, 3 L.Ed.2d 854 (1959)).[3] The court in *Seaboard* reasoned, in part, that unions should not be free to strike in violation of contract terms pending resolution of the controversy merely because those terms are so clear as not to require the mandatory arbitration of the Act:

> From a practical standpoint we can see little difference between an antistrike injunction pending interpretation by a board of adjustment whether a contract allowed reopening, as was approved in *Flight Engineers' Int'l Ass'n* v. *American Airlines, Inc.*, . . . 303 F.2d 5 [(5 Cir. 1962)], and an injunction pending determination by a court whether a prohibition on reopening is illegal.

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[2] The majority acknowledges that the strike issue here involved a minor dispute. I have found no relevant case deciding whether the post-contract setting of the dispute would preclude invocation of the mandatory arbitration procedures of the Act. It seems to me, however, that decisions requiring contractual arbitration in disputes over rights accrued under an expired agreement would be applicable to the statutory arbitration of the RLA. *See, e.g., Nolde Brothers, Inc.* v. *Local 358, Bakery Workers*, 430 U.S. 243, 97 S.Ct. 1067, 51 L.Ed.2d 300 (1977).

[3] As in *Seaboard*, the contract provision in the case before us is quite clear on its face. The union does not appear to argue that the contract clause in question was not intended to forbid strikes against military flights even after impasse. Rather, it contends that even such clauses may be changed unilaterally by self help when the procedures of the Act have been exhausted. As in *Seaboard*, Jurisdiction to determine the validity of a contract provision under the RLA is thus properly invoked.

Id. at 1092. Similarly, I can see little practical difference between an injunction enforcing the arbitrator's decision that a strike was forbidden by the contract, despite an underlying major dispute, *see Buffalo Forge Co.* v. *United Steelworkers, AFL-CIO*, 428 U.S. 397, 405, 96 S.Ct. 3141, 3146, 49 L.Ed.2d 1022 (1976) (NLRA), and an injunction in support of a judicial determination that an anti-strike provision is not only clear, but also valid and binding under the Act.[4]

The majority does not disapprove of *Seaboard's* holding, nor does it appear to deny that the union in the case before us has breached its duty to exert reasonable efforts to "maintain agreements." The majority's main effort to distinguish the case amounts to restating the acknowledged fact that *Seaboard* involved the effect of contractual efforts to preclude a section 6 proceeding rather than efforts to specify permissible post-mediation

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[4] The majority contends that such a distinction between injunctions enforcing an arbitrator's decision and those in support of a judicial decision was adopted by the Supreme Court in *Buffalo Forge*. *See ante* at ——. The Court drew the distinction there because the policy supporting injunctive relief under the NLRA, encouragement of private agreements to arbitrate labor disputes, would be undermined by a decision granting courts authority to intrude on the exclusive jurisdiction of the arbitrator by preliminarily resolving the merits of a contract dispute. But the majority itself reaches a different result, and I concur, on the same sympathy-strike issue as presented in *Buffalo Forge*, on the ground that the statutory arbitration of the RLA involves a broader policy against pre-arbitration strikes. *See infra* at ——. The case more nearly on point, *Seaboard*, relies on this same broad RLA policy against strikes pending resolution of a minor dispute, and concludes that it also applies to questions of statutory construction properly pending before a court. My extension of this reasoning to injunctions supporting the eventual resolution of the statutory issue is supported by the later Second Circuit decision upholding the issuance of a permanent injunction in that case. *Seaboard World Airlines, Inc.* v. *Transport Workers Union*, 443 F.2d 437 (2d Cir. 1971).

measures. But this distinction does not explain why the union activity in *Seaboard* should constitute a more significant breach of the statutory duty to "maintain agreements" than occurred here, nor why injunctive relief was more appropriate there.[5] While the post-mediation setting is not irrelevant, the fact that a minor dispute is also involved suggests that this distinction may not be decisive. The majority appears to conclude otherwise primarily by finding that only the violation of statutory duties bearing a "substantial nexus" to statutory dispute settlement procedures represent a "weighty statutory reason" for abrogating Norris-LaGuardia. *See ante* at ——. I turn next to that contention.

II

The Supreme Court has never stated that the only RLA duties important enough to justify injunctive relief

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[5] Another possible distinction is that a second anomaly would have resulted if injunctive relief against the strike was denied in the setting of *Seaboard*. Section 6 of the RLA forbids unions from striking prior to the completion of the RLA's major dispute procedures, and injunctive relief may support this statutory duty. The refusal to enjoin the strike in *Seaboard* would thus have appeared to grant greater rights to a union which wrongfully demanded that the employer negotiate new terms than to one which appropriately invoked section 6. *See Seaboard World Airlines, Inc.* v. *World Transport Workers Union, supra,* 425 F.2d at 1091-92. Even so, the union in *Seaboard* was not seeking to impose bargaining terms prior to negotiating with the employer, but merely refusing to maintain the prior agreement not to reopen the contract for bargaining. Apart from the alleged breach of the duty to "maintain agreements," the union might well have contended that Norris-LaGuardia protected the use of economic pressure to convince the employer that changed circumstances required negotiation of new security provisions, notwithstading such pressure was in breach of contract. It is significant that the court in *Seaboard* relied on the duty to "maintain agreements" rather than the status quo provision of section 6, the provision that serves to prevent the undermining of a section 6 proceeding by strike tactics.

despite Norris-LaGuardia are those that directly support dispute settlement procedures laid down by the Act. In fact, a number of leading Supreme Court decisions involve breach of the duty of fair representation of minority workers which the Court found implicit in the Act's overall scheme, a duty that does not directly support the Act's procedures for dispute resolution. *See, e.g., Graham* v. *Brotherhood of Locomotive Firemen & Enginemen, supra,* 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22. The majority thus incorrectly asserts that reversal is "compelled by the combination of the manner in which Congress and the RLA chose to reduce disruption in the transportation industry, and the controlling interpretations of the Norris-LaGuardia Act." *See ante* at ——. There simply is no controlling precedent in this case and we are thus forced to reconcile the demands of the RLA and Norris-LaGuardia.

Equally important, several prior cases upholding strike injunctions under the RLA can be adequately explained only by the general RLA policy of avoiding needless disruption of commerce and a corresponding policy of restricting the right to use economic pressure in a minor dispute. Such decisions, including our decision to reverse the district court's refusal to enjoin the sympathy strike against non-military flights, are not unrelated to the RLA's machinery for resolving disputes, but, at the same time, are not directly supportive of that machinery.

For example, in *Brotherhood of R.R. Trainmen* v. *Chicago River & Indiana R.R.*, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957), the Supreme Court held that strikes could be enjoined pending the completion of the minor dispute procedures of the RLA. The Court stressed that strikes might force employers to succumb prior to the Adjustment Board's decision, thereby effectively depriving the Board of jurisdiction. *Id.* at 39, 77 S.Ct. at 639. *See also Boys Markets, Inc.* v. *Retail Clerks Union,*

398 U.S. 235, 252, 90 S.Ct. 1583, 1593, 26 L.Ed.2d 199 (1970). This reasoning explains the result in *Chicago River*, where the Court considered "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee," 353 U.S. at 33, 77 S.Ct. at 636, but it does not explain the application of the *Chicago River* doctrine to factual settings in which the underlying grievance will not be resolved by the arbitration in support of which injunctive relief is sought. The sympathy strike before us, the enjoining of which the majority affirms, involves an entire unit of employees refusing to cross the picket line of sister employees engaged in a post-mediation primary strike. Since the only arbitrable issue is the contractual legality of the strike itself, these employees are not merely required to resolve the underlying dispute in accordance with the statutory scheme, but are precluded from using their most effective weapon pending resolution of the strike issue itself. The decision to enjoin thus preliminarily resolves the merits of the minor dispute over the applicability of the strike clause, arguably in derogation of the Adjustment Board's jurisdiction over that issue.

It was precisely the limited and indirect nature of the relationship between sympathy strikes and the efficacy of a system of arbitration as the means of resolving disputes, that led the Supreme Court to limit the rule of *Boys Markets* to injunctions against strikes "over an arbitrable grievance." *Buffalo Forge Co.* v. *United Steelworkers, AFL-CIO, supra*, 428 U.S. at 407-08, 96 S.Ct. at 3147-48. The majority distinguishes *Buffalo Forge*, correctly I believe, by finding that "the minor dispute arbitration procedure [of the RLA] was designed as a substitute for prearbitration strikes." See *ante* at ——. Whereas under the NLRA the judicial role involves aiding private parties to resolve their disputes, which necessarily focuses concern on whether a particular rule may

discourage parties from agreeing to arbitrate, the judicial role under the RLA involves the implementation of a statutory policy requiring the parties to use reasonable efforts to avoid disruption of commerce. The arbitration scheme is thus read to mean that there is no unqualified "right to strike" in a minor dispute setting, at least where traditional standards of equity are met. The traditional presumption that labor may use its full economic power gives way to a statutory scheme that avoids disruption of commerce by requiring the parties with an established relationship to settle minor disputes without resort to such power.

Despite its post-mediation setting, the union's strike against military flights also involves a minor dispute. That dispute should be resolved before the economic power of the parties is unleashed. The majority acknowledges the anomaly that if a no-strike clause in force during the life of the contract was ambiguous, a strike could be enjoined pending the outcome of minor dispute arbitration. But the anomaly runs even deeper, for if the union had made a colorable claim that the contract clause before us did not intend to preclude post-mediation strikes, the strike could also have been enjoined pending arbitration even in its current setting. *See* note 2 *supra*. It is difficult to see why the availability of injunctive relief should turn exclusively on the clarity of the contract provision in question. Under these circumstances, the union should not be allowed to evade its contractual obligation simply by claiming it is invalid under the statute rather than not required by the contract. Thus, this situation presents an appropriate occasion for judicial enforcement of the duty contained in section 2 First of the RLA.

III

Having concluded that Norris-LaGuardia may give way to the need to enforce an important statutory duty, and that the duty to be enforced may be one that lends

support to the statute's policy against disruption of commerce when there exists a minor dispute under the RLA, I turn now to several additional factors which persuade me that an injunction is appropriate here.

A.

I disagree with the majority's conclusion that upholding the injunction order here would grant courts a general power to police contracts under the RLA.[6] In the first place, courts will almost always lack jurisdiction to do so because of the Adjustment Board's exclusive jurisdiction over disputes concerning the meaning of a contract. Moreover, since the section 2 First duty requires only "reasonable efforts" to "maintain agreements," it is doubtful that courts would find the breach of that duty where good faith disagreements over the meaning of a contract existed. Thus, there is little chance that courts would employ that duty as an excuse for preliminarily resolving disputes between the parties pending arbitration.

I also disagree with the majority's conclusion that one of the underlying purposes of Norris-LaGuardia was to limit the role of courts in enforcing labor contracts. *See ante* at ——. In *Chicago River*, *supra*, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622, which the majority relies on for this assertion, the Supreme Court stated that Norris-LaGuardia was designed to correct the abuses that came when federal courts were "drawn into the field [of en-

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[6] *Cf. Buffalo Forge Co.* v. *United Steelworkers, AFL-CIO*, *supra*, 428 U.S. at 410, 96 S.Ct. at 3149 (arguing that sympathy strike injunction necessarily implies judicial authority to "enjoin any other alleged breach of contract pending the exhaustion of the applicable grievance and arbitration provisions"). As Justice Stevens observed in dissent in *Buffalo Forge*, however, such an argument merely assumes that accommodation means repeal. *See id.* at 422-23 n.11, 96 S.Ct. at 3154-55 (Stevens, J., dissenting).

joining union activities] under the guise either of enforcing federal statutes, principally the Sherman Act, or through diversity of citizenship jurisdiction." *Id.* at 40, 77 S.Ct. at 640. The abuses under diversity jurisdiction came about not through judicial construction of collective bargaining agreements, but because of "the tendency of judges to enjoin concerted activities in accordance with 'doctrines of tort law which made the lawfulness of a strike depend upon judicial views of social and economic policy.' [Citation omitted.]" *Boys Markets, Inc.* v. *Retail Clerks Union, supra,* 398 U.S. at 253 n. 22, 90 S.Ct. at 1593 (quoting Report of Special *Atkinson-Sinclair Committee,* A.B.A. Labor Relations Law Section—Proceedings 226, 242 (1963)). On the other hand, "[w]here an injunction is used against a strike in breach of contract, the union is not subjected in this fashion to judicially created limitations on its freedom of action but is simply compelled to comply with limitations to which it has previously agreed." *Id.* Ironically, the majority elsewhere acknowledges the plausibility of the argument that courts might enjoin unambiguous contract breaches without doing violence to any Norris-LaGuardia policy. *See ante* at ——.

It is true, of course, that the Supreme Court has not read Taft-Hartley's section 301 jurisdiction as repealing Norris-LaGuardia as to disputes over the rights of parties under a collective bargaining agreement. The Court refused to do so largely because "[i]n the course of enacting the Taft-Hartley Act, Congress rejected the proposal that the Norris-LaGuardia Act's prohibition against labor-dispute injunctions be lifted to the extent necessary to make injunctive remedies available in federal courts for the purpose of enforcing collective bargaining agreements." *Buffalo Forge Co.* v. *United Steelworkers, AFL-CIO, supra,* 428 U.S. at 409, 96 S.Ct. at 3148. Nevertheless, as the majority acknowledges, labor rela-

tions under the RLA developed along different lines than in other industries, and "[t]he fundamental premises and principles of the [RLA] are not the same as those which form the basis of the [NLRA] . . . ." *Brotherhood of R.R. Trainmen* v. *Chicago River & Ind. R.R., supra*, 353 U.S. at 31-32 n. 2, 77 S.Ct. at 636.

While I do not argue that Norris-LaGuardia is broadly repealed in every controversy relating to a collective bargaining agreement under the RLA, I am persuaded that, under these facts at least, it is appropriate to enjoin the union's clear breach of its contractual obligation. The union's violation of its statutory duty to "maintain agreements" takes this case outside the ambit of the Court's oft-repeated statement that "although a suit may be brought under § 301 against strikes which, while they are breaches of private contracts, do not threaten any *additional public policy*, in such cases the anti-injunction policy of Norris-LaGuardia should prevail." *Buffalo Forge Co.* v. *United Steelworkers, AFL-CIO, supra*, 428 U.S. at 409, 96 S.Ct. at 3148 (quoting *Sinclair Refining Co.* v. *Atkinson, supra*, 370 U.S. at 225, 82 S.Ct. at 1344 (Brennan, J., dissenting)) (emphasis added). Like other statutory duties under the RLA, the violation of section 2 First does threaten an "additional public policy" and is thus enjoinable.

B.

I also disagree with the majority's conclusion that the policy of allowing the free play of economic forces in the post-mediation setting is unduly compromised by the district court's injunction. It should first be observed that the policy is not absolute. The majority acknowledges that the Supreme Court has sanctioned the enjoining of a post-mediation strike by a union which has violated its section 2 First duty "to exert reasonable efforts to make and maintain agreements" during the negotiating process. *Chicago & N.W. Ry.* v. *United Transp. Union, supra*, 402

U.S. at 571, 91 S.Ct. at 1732. Similarly, it is probable that a strike-injunction could issue pending the outcome of the binding arbitration required by the RLA's minor dispute provisions, even in a post-mediation setting. Finally, as the majority acknowledges, an injunction may issue to enforce an agreement by the parties to submit a major dispute to binding interest arbitration after the mechanisms of the Act are exhausted.

If a union may be compelled to honor its agreement to forego completely the use of economic weapons pending interest arbitration consistent with the policies underlying the RLA and Norris-LaGuardia, it is not clear why they cannot be compelled to honor their commitment to limit the use of such weapons consistent with a narrowly tailored contract provision and their responsibility under section 2 First of the RLA. Indeed, I am convinced of the propriety of this injunction order in part because, like the examples alluded to above, an injunction here would constitute a very narrow exception to the general policy of permitting strikes when negotiations have failed to produce agreement. Allowing an injunction here would not "provide a cover for freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place." *Id.* at 583, 91 S.Ct. at 1738.

It is significant that, as the majority observes, "in this case the military no-strike clause was directed to the discrete transportation function of military flights, the union retaining the right to strike other TIA flights." *See ante* at ——. Specific enforcement of the duty to maintain agreements in this setting does not, like the labor injunctions which led to passage of Norris-LaGuardia, leave the union without alternatives for pressing its demands. *Cf. Brotherhood of R.R. Trainmen* v. *Chicago River & Ind. R.R., supra,* 353 U.S. at 41, 77 S.Ct. at 640 (injunction pending outcome of arbitration justified in

part because it does not strip labor of its primary weapon without substituting any reasonable alternative). The determination whether section 2 First would sustain an injunction against breach of a provision forbidding all strike activity even after mediation has failed to produce agreement may await a later case. *See Seaboard World Airlines* v. *Transport Workers Union, supra,* 425 F.2d at 1091 (emphasizing that its determination of the propriety of injunctive relief involved a spectrum, but finding such relief in that case "still . . . withdrawn from the prohibitions of the Norris-LaGuardia Act").

C.

Finally, in reconciling the policies of Norris-LaGuardia and the RLA, I would put considerable weight on the unique and important governmental interest in avoiding disruption of military flights. This contract provision was required as a condition for obtaining military contracts, reflecting the federal government's belief that such a provision has significance for the nation's security. Here we are dealing with interests that, in a time of emergency, can be essential to our nation's survival. When the union's strike activity clearly violates a contract provision designed to prevent disruption of such a vital part of the nation's military transportation system, an object which goes to the heart of the concerns that distinguish the RLA in the scheme of the nation's labor laws, it behooves us to consider carefully whether section 2 First may not adequately support judicial efforts to see that such a clause is not blatantly ignored.

Under these circumstances I would affirm.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 77-3362
77-3363
77-3395
77-3781

TRANS INTERNATIONAL AIRLINES, INC.,
Plaintiff-Cross-Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, etc., AIRLINE DIVISION TEAMSTER LOCAL 2707; MARVIN G. GRISWOLD; TEAMSTER LOCAL 732,
Defendants-Cross-Appellees.

Nos. 78-1148
78-1232

TRANS INTERNATIONAL AIRLINES, INC.,
Plaintiff-Appellee/Cross-Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*, AIRLINE DIVISION, TEAMSTERS LOCAL 2707, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO,
Defendants-Appellants/Cross-Appellees.

ORDER

Before: GOODWIN, WALLACE, and KENNEDY, *Circuit Judges.*

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

In response to the petition for rehearing, Judge Goodwin files the following statement:

> I would modify the majority opinion to hold that a sympathy strike is a major dispute if the work stoppage with which the sympathy strike is allied is a major dispute. I do not read the Railway Labor Act cases as extending to major disputes the power to enjoin.

(Filed July 27, 1980)

APPENDIX G

STATUTES INVOLVED

The portions of the Railway Labor Act, as amended, involved in this case are Section 2, First, 45 U.S.C. § 152; Section 2, Fourth, 45 U.S.C. § 152, Fourth; Section 2, Seventh, 45 U.S.C. § 152, Seventh; Section 5, First, 45 U.S.C. § 155, First; and Section 6, 45 U.S.C. § 156.

Section 2, First of the Act states:

> First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 2, Fourth states:

> Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees. . . .

Section 2, Seventh states:

> Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions

of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Section 5, First states:

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree

to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Section 6 states:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

The portion of the Norris-LaGuardia Act involved in this case is Section 104, 29 U.S.C. § 104.

Section 104 states:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing,

whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

The portions of the National Labor Relations Act, as amended, analagously involved in this case are Section

8(a)(5), 29 U.S.C. § 158(a)(5); Section 8(b)(3), 29 U.S.C. § 158(b)(3); and Section 8(d), 29 U.S.C. § 158(d).

Section 8(a)(5) states:

> (a) It shall be an unfair labor practice for an employer—
>
> > (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(b)(3) states:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> > (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

Section 8(d) states:

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify

such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the

duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purpose of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

The portions of the Labor-Management Relations Act, as amended, analagously involved in this case are Section 301, 29 U.S.C. § 185.

Section 301 states:

(a) Suits for violation of contracts between an employer and a labor organization representing employes in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the

organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

APPENDIX H

PRE-MERGER TIA FLIGHT ENGINEERS AND PILOTS

(Agreement of July 21, 1974)

"SECTION 21

A. [General No Strike Clause] During the term of this Agreement, the Union shall not authorize, cause, sanction or engage in any strike, picketing, slowdown or stoppage of work.

* * * *

D. [Military No Strike Clause] The Union further agrees that the Crewmembers will continue to perform all duties which are necessary to enable the Company to operate flights for or in support of traffic sponsored by the Department of Defense of the United States of America, even though such Crewmembers withdraw from commercial airline service because of a dispute arising out of negotiations for a new contract after the expiration date of this Agreement and/or during and after all procedures of the Railway Labor Act have been exhausted, . . .

E. [Picket Line Clause] It shall not be a violation of this Agreement, and it shall not be a cause for discharge or disciplinary action in the event a Crewmember refuses to go through or work behind a legal primary picket line maintained by the Union in connection with a dispute between the Company and the Union involving any flight personnel represented by the Union."

PRE-MERGER TIA FLIGHT ATTENDANTS

(Agreement of July 21, 1974)

ARTICLE XII

No Strike—No Lockout

Section A. During the term of this Agreement, the Union shall not authorize, cause, sanction or engage in any strike, picketing, slowdown or stoppage of work.

Section B. During the term of this Agreement, the Company shall not cause, permit, or engage in any lockout of its Flight Attendants.

Section C. During the term of this Agreement, the Company reserves the right to discharge or otherwise discipline any Flight Attendant taking part in any strike, picketing, slowdown or stoppage of work.

Section D. The Union further agrees that the Flight Attendants will continue to perform all duties which are necessary to enable the Company to operate flights for or in support of traffic sponsored by the Department of Defense of the United States of America, even though such Flight Attendants withdraw from commercial airline service because of a dispute arising out of negotiations for a new contract after the expiration date of this Agreement and/or during and after all procedures of the Railway Labor Act have been exhausted, provided the Company shall submit to the Union, when requested, proof that a particular flight is being flown or operated under charter or contract to the Department of Defense.

Section E. It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event a Flight Attendant refuses to go through or work behind a legal primary picket line maintained by the Union in connection with a dispute between

the Company and the Union involving any flight personnel represented by the Union.

FORMER SATURN FLIGHT ENGINEERS

(Agreement of November 17, 1974)

"Section 24

L. [General No Strike Clause] The Company will not lockout any employees covered by this Agreement and the Union and its members, individually and collectively, agree that they will not authorize or take part in any strike or picketing at the Company's premises during the life of this Agreement, until the procedures for settling disputes involving employees covered by this Agreement, as provided for by the Railway Labor Act, have been exhausted by both parties.

* * * *

P. [Military No Strike Clause] Conduct of Military Operations—It is mutually agreed that during the term of the Agreement between the Company and its Flight Engineers as represented by the Union, that the Flight Engineers will not engage in any strike or work stoppage on purely military operations conducted by the Company."

FORMER SATURN PILOTS

(Agreement of May 23, 1972)

This contract contains no general no-strike agreement as such, although it does, in Section 26 C 12, reserve to each party all the rights and privileges accorded under the provisions of the Railway Labor Act.

"Section 29

* * * *

K. [Military No Strike Clause] In the interest of national defense and in the event of the withdrawal from service from Saturn Airways, Inc., of crew members covered by this agreement, essential military services shall be permitted to operate; provided, however, that this policy shall only pertain to those flights that are solely and completely military in nature and whose entire cargo is comprised of military commodities or military personnel."

Supreme Court, U.S.
FILED
JAN 14 1981
MICHAEL RODAK, JR., CLERK

No. 80-478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AIRLINE DIVISION; TEAMSTERS LOCAL 2707; MARVIN L. GRISWOLD; TEAMSTERS LOCAL 732,

Petitioners,

v.

TRANS INTERNATIONAL AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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IN THE

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OCTOBER TERM, 1980

No. 80-478

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AIRLINE DIVISION; TEAMSTERS LOCAL 2707; MARVIN L. GRISWOLD; TEAMSTERS LOCAL 732,

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR THE PETITIONERS

On November 17, 1980, the Respondent Trans International Airlines, Inc. (TIA)[1] was instructed to respond to the petition for certiorari filed in No. 80-478 by the International Brotherhood of Teamsters, Airline Division (Teamster Petitioners) and to the petition filed in 80-470 by the Air Line Pilots Association, International (ALPA). This reply brief is being filed by the Teamster Petitioners to respond to various matters raised for the first time by Respondent's Brief In Response.[2]

---

[1] The Respondent has changed its name to Transamerica Airlines, Inc.; however, it will be referred to as "TIA" here to avoid confusion.

[2] In No. 80-480, TIA seeks certiorari to review the lower Court's unexceptional decision holding that military no-strike clauses cannot be enforced specifically through injunctions issued by the fed-

ARGUMENT

1. The Lower Court's Decision Upholding An Injunction Against Sympathetic Action Pending Arbitration Cannot Be Reconciled With This Court's Decisions.

TIA has urged review of the question whether employees can be enjoined from sympathetically honoring the picket lines of their fellow workers pending arbitration of the propriety of such sympathetic action under contractual no-strike commitments. To this extent, at least, it joins both petitioning labor organizations in recognizing the critical importance of the lower court's decision. On the other hand, we take sharp exception to TIA's contention that the lower court's decision can somehow be reconciled with this Court's decision in *Buffalo Forge Co.* v. *USW*, 428 U.S. 397 (1976).

In *Buffalo Forge*, the union had gone on strike, not because of any dispute it had with the employer, but to support other local unions of the same international organization that had struck when contract negotiations with the common employer broke down. There, as here, the sympathizing union was party to a collective bargaining agreement containing a no-strike clause which the union contended, and the employer disputed, did not prohibit sympathetic action. The employer sought an injunction against the strike pending resolution of the dispute created by the union's observance of its sister locals'

---

eral district courts, and also to have this Court decide whether sympathetic action is prohibited by the major dispute provisions of the Railway Labor Act, 45 U.S.C. §§ 152, First, 155, 156, 160, an issue the court below expressly declined to reach. Obviously attempting to bootstrap its own cause in No. 80-480, TIA has reiterated here the arguments it made in its petition. In the Teamsters' Brief In Oposition, we responded to TIA's petition by showing that the distinct issues raised there do not warrant this Court's attention and that they are quite different from the questions presented for review in Nos. 80-478 and 80-470. There is no need for us to repeat what already has been made clear, and thus we will rely on our opposition brief ("IBT Op. Br.") to avoid repetition.

picket lines through arbitration. Injunctive relief was denied in both lower courts and this Court affirmed.

The Court concluded in its opinion that the reasoning of *Boys Markets, Inc.* v. *Retail Clerks*, 398 U.S. 235 (1970), which held that the federal policy favoring arbitration warranted preliminary injunctive relief against strikes over arbitrable grievances, was inapplicable to sympathetic work stoppages. This was because the arbitration process cannot be frustrated where, as here, there is no underlying issue other than the strike itself to be arbitrated, and thus the anti-injunction policy embodied in § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, must prevail. Significantly, the Court said:

> "If an injunction could issue against the strike in this case, so in proper circumstances could a court enjoin any other alleged breach of contract pending the exhaustion of the applicable grievance and arbitration provisions even though the injunction would otherwise violate one of the express prohibitions of § 4. The court in such cases would be permitted, if the dispute was arbitrable, to hold hearings, make findings of fact, interpret the applicable provisions of the contract and issue injunctions so as to restore the status quo or to otherwise regulate the relationship of parties pending exhaustion of the arbitration process. This would cut deeply into the policy of the Norris-LaGuardia Act and make the courts potential participants in a wide range of arbitrable disputes under the many existing and future collective bargaining contracts, not just for the purpose of enforcing promises to arbitrate, which was the limit of Boys Markets, but for the purpose of preliminarily dealings with the merits of the factual and legal issues that are subjects for the arbitrator and of issuing injunctions that would otherwise be forbidden by the Norris-LaGuardia Act." [*Buffalo Forge Co. v. United Steelworkers, supra*, 428 U.S. at 410-11. (Footnotes omitted.)]

Notably TIA does not dispute the district court's conclusion that the facts of this case and those of *Buffalo Forge* are virtually identical (Pet. App., at 17a). Indeed, the Ninth Circuit Court of Appeals' decision is not premised on any factual difference. Nevertheless, the court of appeals declined to follow *Buffalo Forge*, effectively holding that Norris-LaGuardia's protections have a more limited application to labor disputes arising in the rail and air industries than to labor disputes in other industries. The Norris-LaGuardia Act, of course, admits of no such distinction in its definition of "labor dispute." 29 U.S.C. § 113.

Nor can the result reached by the court of appeals be justified on the basis of accommodating Norris-LaGuardia to the specific commands of the Railway Labor Act. The court below cited no specific requirement, either in the RLA itself or in its legislative history, that could be contravened by sympathetic action.[3] And, the RLA's policies mandating arbitration as the "means for the settlement of minor disputes known as 'grievances,'"[4] as elaborated by this Court in *BRT* v. *Chicago River & Ind. R.R.*, 353 U.S. 30 (1957), "apply with equal force" to injunctions under § 301 of the LMRA. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 249 (1962) (Brennan, J., dissenting); *Boys Markets, Inc.* v. *Retail Clerks*, *supra*, 398 U.S. at 252. See also *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 458 (1957).

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[3] One of the RLA's general purposes, of course, is to avoid interruptions to transportation (Pet. App., at 61a), a purpose that is identical to the LMRA's object of avoiding "industrial strife which interferes with the normal flow of commerce . . . ." 29 U.S.C. § 141. Literal application of this general policy "would obviously outlaw any and all strikes in the rail and air industries . . . ." D. E. Cullen, *Strike Experience Under the Railway Labor Act*, in "The Railway Labor Act at Fifty" 188 (1976).

[4] H. Rep. No. 1944, 73d Cong., 2d Sess. 2 (1934), in Subcomm. on Labor, Senate Comm. on Labor and Public Welfare, *Legislaitve History of the Railway Labor Act, As Amended* 919 (1974).

In *BRT* v. *Jacksonville Terminal Co.*, 394 U.S. 344, 385-86 (1969), moreover, this Court rejected any purported distinction in the right of self-help available under the RLA and the LMRA, stating:

> "The Court has consistently held peaceful primary picketing incident to a lawful strike to be protected conduct under the National Labor Relations Act. 'Picketing has traditionally been a major weapon to implement the goals of a strike' and 'it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing.' We see no possible grounds for distinguishing picketing under the Railway Labor Act. Peaceful primary strikes and picketing incident thereto lie within the core of protected self-help under the Railway Labor Act." [Citations omitted.]

Consequently, the Court below had no valid reason for its refusal to follow *Buffalo Forge*. The relevant statutory policies in the RLA and the LMRA are the same; in this case, the anti-injunction policy of Norris-LaGuardia should also prevail. Nothing TIA says requires a different result. Its novel argument that the RLA itself, independent of any contractual no-strike clause, imports a statutory prohibition against sympathetic action incident to a lawful primary strike is either circular or contrary to existing authority.[5] More signifi-

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[5] TIA's statutory argument is more than a little imprecise. If TIA contends that § 2, First requires that the no-strike clause be maintained, then its theory of a statutory violation presupposes a breach of that clause. But this determination is for the adjustment board, which has exclusive jurisdiction over minor disputes (*O'Donnell* v. *Wien Air Alaska, Inc.*, 551 F.2d 1141 (9th Cir. 1977)), and § 2, First adds nothing to the court's authority to enforce the board's award. *IAM* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963). To the extent TIA contends that § 2, First is a contract enforcement device akin to § 301 of the LMRA, 29 U.S.C. § 185, it is simply wrong. See IBT Op. Br., at 9-16. Finally, in the absence of a no-strike clause, sympathetic action does not even arguably violate

cantly, TIA offers no rationale[6] for the court of appeals' implication of an independent federal remedy against self-help—a remedy created not to vindicate the Act's minor dispute procedure, which was the limit of *Chicago River*,[7] but to minimize the economic pressure employees can exert in major disputes.[8]

The issue presented for review in Nos. 80-470 and 80-478 should be resolved by this Court because the lower court's decision is inconsistent with *Buffalo Forge*. Also, an issue of this importance, having an immediate and dramatic impact on labor relations in the nation's rail and air industries, should not be determined by a split panel of the court of appeals.

2. This Case Is Moot Under The Standards Established By This Court.

The facts enumerated by TIA (Br., at 15-16) disclose no basis for distinguishing *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418 (1911) (*Gompers II*). Contrary to its assertions, TIA was not entitled to settle

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the RLA. *BRT* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1966); *BLFE* v. *Florida E. Coast Ry.*, 346 F.2d 673 (5th Cir. 1965); *Chicago & Ill. Midland Ry.* v. *BRT*, 315 F.2d 771, 776-78 (7th Cir.) (dissenting opinion), *vacated as moot*, 375 U.S. 18 (1963).

[6] TIA's discussion contrasting the RLA's major dispute procedure with how contracts are negotiated under the LMRA (TIA Br., at 11-13), is irrelevant to the issue decided by the court below (see IBT Op. Br., at 17-20). Because breach of a no-strike clause does not constitute an unfair labor practice (*Cheney California Lumber Co.* v. *NLRB*, 319 F.2d 375, 378 (9th Cir. 1963)), TIA's doubtful description of the NLRB's administrative procedures for remedying unfair labor practices (TIA Br., at 13) is also beside the point. Its remaining statements (TIA Br., at 14) are both unsupported and unsupportable.

[7] *BRT* v. *Chicago River & Ind. R.R.*, *supra*, 353 U.S. 30.

[8] *BLFE* v. *Florida E. Coast Ry.*, *supra*, 346 F.2d at 676.

fully the underlying dispute which led to the grant of preliminary injunctive relief, thereby obviating the need for a final injunction and mooting the main case, and still continue to press its injunction case. Certainly the same dispute cannot be both settled and litigated. TIA's comments regarding the absence of a "back-to-work" agreement are irrelevant, since the dispute which gave rise to the main action was fully settled without such an agreement.[9] Thus, at this point, the main case was in the same posture as *Buck's Stove & Range Co.* v. *Gompers*, 219 U.S. 581 (1911) (*Gompers I*).

This Court's decision in *Gompers II* was not based on "waiver." It cannot realistically be argued that Buck's, in settling the main action, intended to end the contempt case, which this Court held to be civil in nature and thus ancillary to the main action. Accordingly, it is immaterial here whether TIA, by effectively settling the main injunctive action, intended to continue the derivative contempt proceeding.[10] The latter "proceeding necessarily ended with the settlement of the main cause of which it is a part . . . ." 221 U.S. at 452.[11]

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[9] There was no mutual understanding that the parties "retained all prior claims spawned by the strike" (TIA Br., at 16-17); indeed, no agreement at all was reached, and the parties were left to pursue whatever legal remedies they possessed.

[10] TIA persists in arguing this issue as if a factual issue exists over whether it agreed in January, 1978, that the contempt proceeding would be dismissed. There was no such agreement, no factual issue, and no need for a record on this point.

[11] The July 23, 1979 affidavit submitted in response to the court of appeals' show cause order, which apparently is not fully understood by TIA (see Br., at 15), is reproduced in Appendix B, *infra* at 3a. The court below had little difficulty in understanding it, however (Pet. App., at 37a), and there can be no doubt that it clearly raised the *Gompers II* issue, *infra* at 9a.

3. The Lower Court Correctly Held That The Military No-Strike Clause Could Not Be Specifically Enforced By Injunctive Order. Review Of This Issue, Presented By TIA's Petition In No. 80-480, Is Not Warranted.

As shown (IBT Op. Br., at 9-16), the only basis on which the equity jurisdiction of the federal courts can be invoked in a railway or airline labor dispute is to protect the integrity of the Railway Labor Act's dispute settlement mechanisms. In this case, the Act's major dispute procedures were exhausted in an unsuccessful, good-faith attempt to reach agreement. Since the Act's procedures were not endangered by the threatened strike against military flights, the Norris-LaGuardia Act precluded the district court from specifically enforcing the military no-strike clause. Not surprisingly, TIA's view of § 2, First as an independent contract enforcement device—instead of an element in "an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day 'cooling-off' period" [12]—was rejected by the Court below.

Long Island R.R. v. *System Federation No. 156*, 368 F.2d 50 (2d Cir. 1966), which involved bad-faith bargaining and failure to exhaust the Act's procedures, does not support TIA's view of the Act. There the Second Circuit Court of Appeals upheld an injunction against a strike having two objects: (1) to force the railroad to bypass the System Federation (the "representative" of the railroad's shop craft employees) and negotiate directly with Railway Carmen's Lodge 886; and (2) to compel the railroad to grant wage increases and make rules changes, even though the applicable national and local agreements would not expire for another year. Stating that the union had "short-circuit[ed]" the Act, the court of appeals held: "Since the carmen did not

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[12] *Detroit & Toledo Shore Line R.R.* v. *UTU*, 396 U.S. 142, 152 (1969).

utilize the procedures of the Act for minor or major disputes—indeed did not even initiate them—the union's resort to self-help was unwarranted." *Id.* at 53.

Attempting to transform the military no-strike clause into an agreement on contract duration, which it obviously was not, TIA urges that the entire collective bargaining agreement was continued beyond the status quo period with respect to military flights by the clause (TIA Br., at 6). This is incorrect. The contract was continued with respect to military flights, not by agreement of the parties reached in free collective bargaining, but by court decree (Pet. App., at 10a). By its terms, the military no-strike clause had nothing to do with the duration of the agreement. And, reliance on the court's artificial extension of the agreement beyond its expiration cannot turn the military no-strike clause into something it is not.

In fact, the district court's order serves to illustrate the error it made in enforcing the clause by injunctive decree. Once having ordered the flight attendants to work during their lawful primary strike, the district court realized that it had tipped the balance of economic power in favor of the carrier (Pet. App., at 7a). It then sought to remedy the situation by ordering TIA to adhere to the agreement in connection with its operation of military flights (Pet. App., at 10a), thereby establishing the terms and conditions under which the flight attendants would work. *Compare H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). As the court of appeals held in reversing, the Norris-LaGuardia Act was enacted to prevent the federal courts from altering, through injunctions, the economic balance between labor and management (Pet. App., at 54a).

CONCLUSION

For the foregoing reasons, the petition for certiorari in No. 80-478 should be granted, and the petition in No. 80-480 should be denied.

Respectfully submitted,

DAVID PREVIANT
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Attorneys for Petitioners, International Brotherhood of Teamsters, et al.

DATED: January 14, 1981

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 77-3362, 77-3363, 77-3395, 77-3781, 78-1148, and 78-1232

DC# Cv 77-2010 RFP

TRANS INTERNAL * AIRLINES, INC.,
Plaintiff-Cross-Appellant,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, etc., AIRLINE DIVISION TEAMSTERS LOCAL 2707; MARVIN G. GRISWOLD; TEAMSTERS LOCAL 732,
Defendants-Cross-Appellees.

TRANS INTERNATIONAL AIRLINES, INC.,
Plaintiff-Appellee-Cross-Appellant.

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,
Defendants-Appellants/Cross Appellees.

Appeal from the United States District Court for the Northern District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

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* So in original.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in part, reversed in part and remanded for further proceedings.

The parties shall bear their own costs for the appeals take * to this court.

Filed and entered February 14, 1980.

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* So in original.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 77-3362, 77-3363, 77-3395 and 77-3781

TRANS INTERNATIONAL AIRLINES, INC.,
Appellant, Cross-Appellee.

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AIRLINE DIVISION, TEAMSTERS LOCAL 2707, AIRLINE, AEROSPACE AND ALLIED EMPLOYEES; MARVIN G. GRISWOLD; AND TEAMSTERS LOCAL 732,
Appellees, Cross-Appellants,

Nos. 78-1148 and 78-1232

TRANS INTERNATIONAL AIRLINES, INC.,
Appellee, Cross-Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AIRLINE DIVISION; TEAMSTERS LOCAL 2707; AND AIRLINE PILOTS ASSOCIATION INTERNATIONAL, AFL-CIO,
Appellants, Cross-Appellees.

AFFIDAVIT IN RESPONSE TO THE COURT'S ORDER OF JULY 5, 1979

Appeal From The United States District Court
For The Northern District Of California

Before: GOODWIN, WALLACE and KENNEDY, Circuit Judges

AFFIDAVIT

DISTRICT OF COLUMBIA)
) ss:
WASHINGTON,)

I, ROLAND P. WILDER, JR., of 25 Louisiana Avenue, N.W., Washington, D.C. 20001, being duly sworn, do hereby depose and say:

1. Your affiant is a lawyer licensed to practice in Washington of the District of Columbia. I am a member of the Bar of the United States Court of Appeals for the Ninth Circuit. By permission, I have represented the International Brotherhood of Teamsters Airline Division, Teamsters Local Unions 732 and 2707, Marvin L. Griswold and Henry J. Breen [hereinafter "Teamster defendants"], before the District Court and in appellate proceedings before this Court. For purposes of this cose, I am associated with Kenneth L. Silbert, Esquire, Beeson, Tayer & Kovach, 100 Bush Street, San Francisco, California-94104, and Robert J. Higgins, Esquire, Dickstein, Shapiro & Morin, 2101 L Street, N.W., Washington, D.C.-20037.

2. This affidavit is submitted in accordance with this Court's Order of July 5, 1979, directing that cause be shown why this appeal should not be dismissed as moot. The Order requires a specific enumeration of the issues,

whether of law or fact, "which constitute a case or controversy within the meaning of Article III of the United States Constitution and *Illinois State Board of Elections* v. *Socialist Workers Party*, 47 U.S.L.W. 4197, 4201 (U.S., Feb. 22, 1979)." The Teamster defendants contend that this appeal cannot be dismissed unless a mandate issues directing the lower Court to dismiss the main case and ancillary civil contempt proceedings for mootness.

3. These consolidated cases are before the Court under 28 U.S.C. § 1292 and 29 U.S.C. § 110, upon appeals from the District Court's orders enjoining the Teamster defendants (then the representative of TIA's flight attendants and flight engineers) and the Air Line Pilots Association (the representative of TIA's pilots) from interfering with TIA's military flight operations during a strike beginning in September, 1977, by the flight attendants. [96 L.R.R.M. 2763, 2766.] TIA has cross-appealed from the District Court's refusal to enjoin strike activity by the flight atendants against commercial operations, as well as from its refusal to enjoin sympathetic action by the flight engineers and pilots affecting nonmilitary traffic.

4. The Teamster defendants noticed their appeal from the District Court's injunctive orders on Ocotber 4, 1977. After their application to suspend the injunctions was denied by the District Court, they moved this Court to stay the injunctions pending appeal. TIA cross-moved for temporary relief pending appeal in an attempt to obtain the relief denied it by the District Court. These motions were argued before a panel of this Court on October 19, 1977, and remain under submission. The main appeal has been briefed by all parties and is awaiting argument.

5. During the strike, TIA filed a Petition for Adjudication in Civil Contempt, which came on for hearing before the Honorable Cecil F. Poole on November 1, 1977. Judge Poole found that beginning on Sunday, October 30,

1977 and continuing to 7:52 P.M. on November 1, 1977, the Teamster defendants were in contempt of the preliminary injunction orders. No evidence was taken on the amount of damages allegedly suffered by TIA. Nor did TIA specify the amount of compensatory damages it sought. Judge Poole ordered that "the matters of award of compensation to the plaintiff" be referred to Chief Judge Peckham, who had issued the preliminary injunctions. On November 9, 1977, the Teamster defendants appealed from the contempt adjudication (Case Nos. 78-1091, -1092). These appeals were dismissed on November 24, 1978, by this Court.

6. The basic question regarding the validity of the injunctive orders, of course, was already pending before this Court by reason of the instant appeals. Discovery and trial on the question of compensatory damages, if any, due TIA because of the Teamster defendants' conduct on October 30, 31 and November 1, 1977, has been continued until this Court decides the pending appeals. For TIA's entitlement to compensatory damages, in the first instance, turns on whether the preliminary injunctive orders were lawfully entered.[1]

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[1] "A judgment of civil contempt, being remedial in nature, stands or falls within the validity or invalidity of the order, and the opposing party should be compensated only if he was entitled to the order." *Lewis* v. *S. S. Baune*, 534 F.2d 1115, 1119 (5th Cir. 1976) (citations omitted). *Accord, e.g., United States* v. *United Mineworkers*, 330 U.S. 258, 304 (1947), (the right of "a civil litigant to the compensatory fine is dependent upon the outcome of the basic controversy"); *Latrobe Steel Co.* v. *United Steelworkers*, 545 F.2d 1336, 1345-46 (3d Cir. 1976) ("a compensatory civil contempt judgment cannot withstand the reversal of an injunction . . . a private party should not profit as a result of an order to which [it is later determined] he was never entitled"); *Heyman* v. *Kline*, 456 F.2d 123, 131 (2d Cir.), *cert. denied*, 409 U.S. 847 (1972) ("judgments of civil contempt fall when the order underlying them is vacated"); *Salvage Process Corp.* v. *Acme Tank Cleaning Process Corp.*, 86 F.2d 727 (2d Cir. 1936) ("[t]o let the

7. The flight attendant strike continued from September 10, 1977 until early January, 1978, when TIA and the Teamster deefndants entered into a new flight attendant agreement effective for a three-year term. Strike activity was not resumed after agreement was reached. The new agreement inculdes a military clause containing the same terms as the one in issue on this appeal.

8. Substantial difficulties were encountered in January, 1978, regarding the reinstatement of strikers, the rights of Union negotiating committee members, and the resolution of certain employee claims that had arisen during and after the strike. These matters led to the filing of a counterclaim by the Teamster defendants on February 1, 1978, asserting a variety of claims against TIA. Thereafter, TIA moved to dismiss the counterclaim. Its dismissal motion has been briefed and argued along with various discovery motions. All motions were submitted on May 7, 1979, and are currently pending decision before the District Court.

9. The Teamster defendants no longer represent the flight attendant craft or class on TIA's property. Following an election in which the flight attendants voted to change their representative, the National Mediation Board certified the Association of Flight Attendants as the statutory collective bargaining agent for the craft or class. [*Trans International Airlines, Inc.*, Case No. R-4931 (NMB, June 4, 1979).]

10. The District Court has been advised of the Teamster defendants' loss of representative status, and of the fact that this development appears to raise difficult questions regarding the Teamster defendants' right to

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liability stand for past contumacy would be to give the plaintiff a remedy not for a right but for a wrong, which the law should not do").

continue to act in reference to the counterclaim.[2] It was suggested that the Court might wish to withhold temporarily its decision on pending motions until the Teamsters Union could bring the issues raised by loss of its representative status before the Court in an appropriate manner.

11. In regard to this Court's July 5, 1979 Order to show that "'(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or termination, and (2) there . . . [is] a reasonable expectation that the same complaining party would be subjected to the same action again,'"[3] I note the following:

a. There can be no expectation that TIA will be subjected to the Teamster defendants' alleged bad-faith bargaining tactics, since TIA's flight attendants now have a different bargaining representative. Thus, TIA's appeal from the District Court's refusal to enjoin a strike against the Carrier's commercial operations is clearly moot.[4] Similarly the Teamster defendants could hardly direct flight attendants to strike TIA's military operations in the absence of representative status.

b. Although it is conceivable that the Teamster-represented flight engineers might sympathetically respect a future picket line established by the Association of Flight Attendants, this decision would have

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[2] *International Brotherhood of Teamsters* v. *Zantop Air Transport Corp.*, 394 F.2d 36 (6th Cir. 1968); *Cf. Adams* v. *Federal Express Corp.*, 547 F.2d 319 (6th Cir. 1976), *cert. denied*, 431 U.S. 915 (1977).

[3] *Illinois State Board of Elections* v. *Socialist Workers Party*, *supra*, 47 U.S.L.W. at 4201.

[4] The Teamster defendants have already argued that this aspect of the Carrier's cross-appeal is moot. See Brief of Defendants-Appellees/Cross-Appellants, at p. 14, n.3.

to be made when and if the flight attendants strike after their current contract expires and they have exhausted the Railway Labor Act's procedures. Because no one can foresee what circumstances will prevail several years into the future, nothing more can be said than the flight engineers' sympathetic action in 1977 on behalf of the flight attendants is capable of repetition.

12. The question of whether the Teamster defendants' appeals from the District Court's military strike injunctions present a case or controversy, in one sense, turns on the civil contempt proceeding. Certainly if the contempt proceeding is to continue into a compensatory fine phase, the validity of the original injunctions is very much a live issue. TIA cannot recover any damages if, as the Teamster defendants contend in these appeals, the military strike injunctions are invalid. [See authorities cited in note 1, *supra.*] Basic considerations of fairness militate against further prosecution of a civil contempt action after the contemnor's right to defend on the ground that the injunction was improvidently issued has been taken away by a determination that the main action has become moot.[5]

13. TIA posted a $10,000 bond to indemnify the Teamster defendants for fees, costs and injury suffered in the event it was subsequently determined that the preliminary injunctions had been improvidently granted. The right of the Teamster defendants to indemnification

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[5] Upon a determination that the main action has become moot and thus unreviewable on appeal, the lower Court loses jurisdiction over pending civil contempt proceedings. *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 451-52 (1911). This is because no independent jurisdictional basis for the contempt exists apart from the main action. "[W]ithout a final decree, a civil contempt order cannot have any finality." *Pacific Gamble Robinson Co.* v. *Minneapolis & St. Louis Ry.*, 92 F. Supp. 352, 354 (D. Minn. 1950), citing *Fox* v. *Capital Co.*, 299 U.S. 105 (1936).

depends upon a decision on the merits.[6] Unless this right is waived, these cases are not moot.[7] I have been instructed to, and hereby do, enter a conditional waiver of the Teamster defendants' right to claim on the indemnification bond. Thus, if final dismissal of the main case and all civil contempt proceedings for mootness is otherwise warranted, the Teamster defendants waive their right to seek indemnification.

14. If, due to continuation of the civil contempt proceedings, a controversy remains regarding the validity of the District Court's military strike injunction, the following issues are before the Court:

a. Does a provision in a collective bargaining agreement subject to the Railway Labor Act remain in effect after a Section 6 Notice, proposing changes in the provision, has been given, and the proposed changes have been fully processed under the Act's mandatory procedures through the thirty day "cooling-off" period?

b. Did the District Court lack jurisdiction to enforce by injunction a military no-strike clause that allegedly survived exhaustion of the mandatory procedures prescribed by the Act according to the parties' intent?

(1) Do the Federal Courts have either diversity or Federal question jurisdiction to enforce the provisions of collective bargaining agreements subject to the Railway Labor Act?

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[6] *NAPA Pittsburgh, Inc.* v. *Automotive Chauffeurs, Local 926*, 502 F.2d 321, 322 n.1 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974).

[7] *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 305 (1964); *Associated General Contractors of Minnesota* v. *I.U.O.E., Twin City Local 49*, 519 F.2d 269 (8th Cir. 1975); *Rochester Tel. Corp.* v. *C.W.A.*, 456 F.2d 1057 (2d Cir. 1972); *NAPA Pittsburgh, Inc.* v. *Automotive Chauffeurs, Local 926, supra*, 502 F.2d at 322 n.1.

(2) Does the Norris-LaGuardia Act prohibit issuance of an injunction to specifically enforce a no-strike clause?

c. Did the District Court lack jurisdiction under the Railway Labor and Norris-LaGuardia Acts to enjoin flight engineers employed by the Carrier from respecting the picket lines established by its flight attendants, where the engineers' concerted activity did not relate to an arbitrable dispute between them and the Carrier, but was resorted to solely to support the flight attendants in their major dispute?

15. I have served a copy of this Affidavit upon each attorney of record in accordance with the attached Certificate of Service.

I have read the foregoing Affidavit consisting of fifteen paragraphs, and, except for footnotes and bracketed material unsuitable for verification, it is true and correct to the best of my knowledge, information and belief.

/s/ Roland P. Wilder, Jr.
ROLAND P. WILDER, JR.

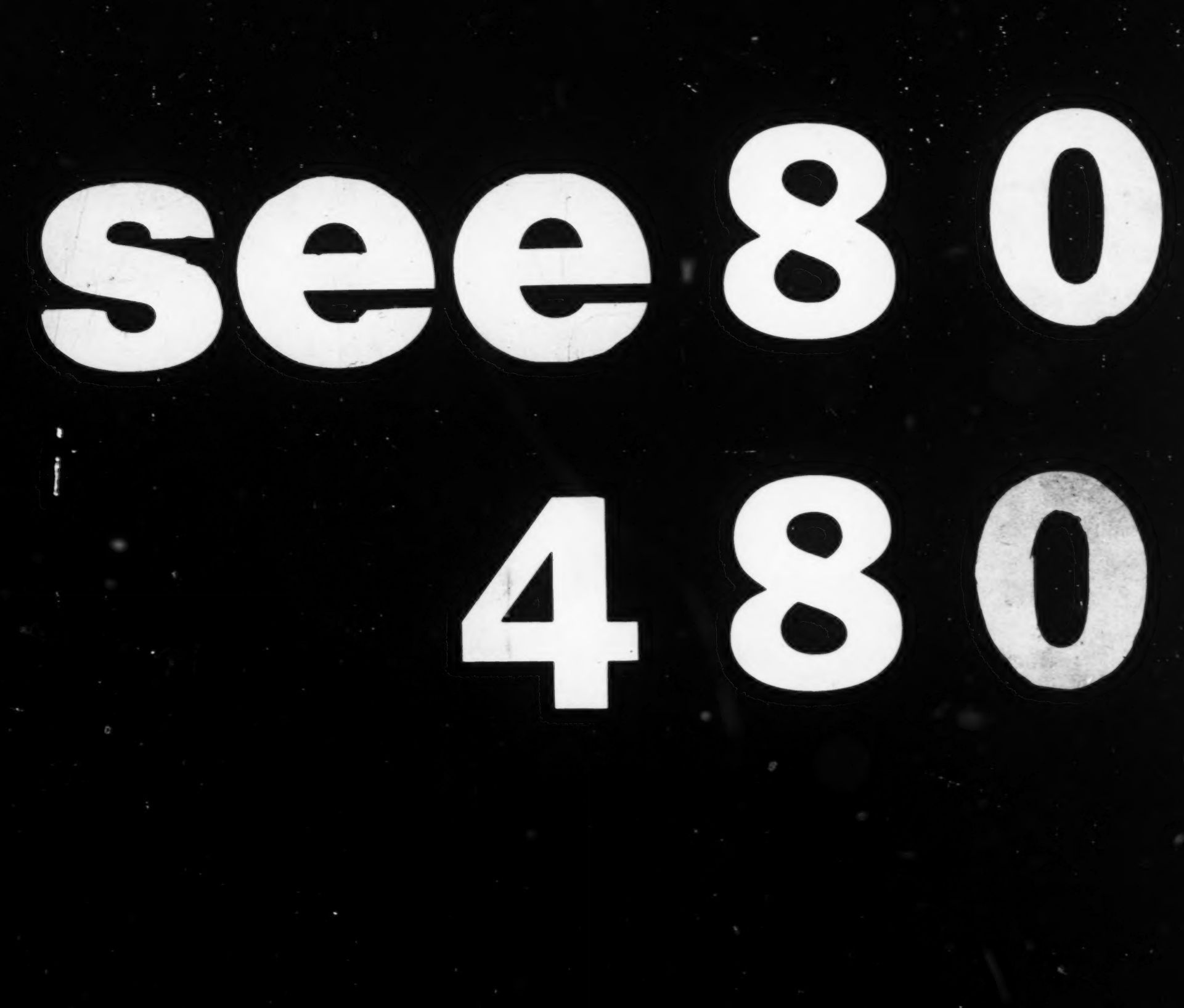
Subscribed and sworn to before me this 23rd day of July, 1979.

/s/ Melvin Hardy
Notary Public

My Commission Expires June 30, 1981.

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